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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY, APPELLANT,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED MARCH 26, 1945

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IN CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

PETITION—Filed June 17, 1943

To the Honorable Walter T. McCarthy, Judge of the Circuit Court of Fairfax County, Virginia:

Your petitioner, J. A. Anderson, State Highway Commissioner of Virginia, files this his petition in accordance with an Act of the General Assembly passed at the 1942 session, and approved April 4th, 1942, Chapter 411, page 650 of the Acts of the Assembly of 1942, and such general laws as may be applicable for the purpose of condemning certain land in Fairfax County, Virginia, as hereinafter described, and alleges as follows:

. . . . . .

[fol. 5] 11. That a bona fide but ineffectual effort has been made by your petitioner to purchase the strips or parcels of land hereinafter described containing 3.98 acres, more or less, from the owners thereof but your petitioner has been unable to agree as to compensation and damages, if any, caused thereby.

[fol. 6] 12. That the said Bernard B. Bailey and Eunice R. Bailey, his wife, are the owners of the said tracts of land, containing 32 acres and 2 roods, 1 rood, 3.524 acres, and 2.931 acres, as hereinbefore set out, located in Dranesville Magisterial District, Fairfax County, Virginia, a part of which land is described in the above declaration marked Exhibit "A" embraced in the State Highway System and shown and described by lines on a blue print map of a portion of said road identified as Sheets Nos. 3 & 4, project 514-E, Route 7, on file in the offices of the Department of Highways at Richmond, Virginia, a copy of which is hereto attached, marked Exhibit "B", and prayed to be read as a part hereof.

. . . . . .

[fol. 7] 14. That the interests, rights and property intended to be taken by these proceedings is the fee simple

title to the said strips or parcels of land of the said defendants hereinabove described; that the said strips or parcels of land are necessary for the construction, alte-ra-
[fol. 8] tion, maintenance and repair of roads embraced in the State Highway System and for these purposes and for all purposes incidental thereto, known as Route 7 in Fairfax County, Virginia, and that it is requisite and suitable that the said strips or parcels of land through the land of the defendants be of the width and on the routes and grades as shown on said blue prints and plats.

15. Wherefore, your petitioner prays that Commissioners be appointed to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for such uses and to award damages, if any, resulting to the adjacent or other property of the owners or the property of any other person, beyond the peculiar benefits that will accrue to such properties respectively from the construction and operation of the highway.

. . . . . .

[fol. 9] J. A. Anderson, State Highway Commissioner of Virginia. By (Signed) John W. Rust, Agent and Attorney for the State Highway Commissioner of Virginia.

[fols. 10-11] IN CIRCUIT COURT OF FAIRFAX COUNTY

PLEA DENYING AUTHORITY TO CONDEMN LAND—Filed July 9, 1943

Comes now the defendant, Bernard B. Bailey, and alleges that the petitioner has no authority to condemn the land described in the petition herein for the reasons particularly set forth in the petition filed in this Court on the 21st day of October, 1941, in Chancery cause No. 5762, styled Bernard B. Bailey vs. J. A. Anderson, State Highway Commissioner, which cause is now pending on appeal in the Supreme Court of Appeals of Virginia, Record No. 2708; that on October 16, 1941, the petitioner entered upon and took the land described in the petition herein pursuant to Sections 1969j (4) and 1969j (6), 1940 Supp.

to the Virginia (Michie) Code and, acting under said statute, filed with the Clerk of this Court a certificate of deposit of a sum of money representing the petitioner's estimate of the amount of compensation to be paid the defendant; that said statute is unconstitutional for the reasons particularly set forth in the petition filed in said Chancery cause No. 5762; and that the question of the validity of said statute is now pending on appeal in the Supreme Court of Appeals of Virginia, Record No. 2708; and defendant alleges further that no final decree has been entered by the Supreme Court of Appeals of Virginia in said Record No. 2708.

(Signed) Bernard B. Bailey.

[fol. 12] IN CIRCUIT COURT OF FAIRFAX COUNTY

PLEA DENYING AUTHORITY TO CONDEMN LAND—Filed March 16, 1944

* * * * * * * *

Comes now the defendant Bernard B. Bailey, and alleges that the petitioner has no authority to condemn the land described in the petition herein for the reasons particularly set forth in the petition filed in this Court on the 21st day of October, 1941, in Chancery cause No. 5762, styled Bernard B. Bailey v. J. A. Anderson, State Highway Commissioner; that on October 16, 1941, the petitioner entered upon and took the land described in the petition herein pursuant to Sections 1969j (4) and 1969j (6). 1940 Supp. to the Virginia (Michie's) Code and, acting under said statute, filed with the Clerk of this Court a certificate of deposit of a sum of money representing the petitioner's estimate of the amount of compensation to be paid the defendant; that said statute is unconstitutional for the reasons particularly set forth in the petition filed in said Chancery cause No. 5762; that an appeal in said Chancery cause No. 5762 was granted by the Supreme Court of Appeals of Virginia (Record No. 2708), and a judgment was entered on December 6, 1943; that a petition for rehearing was denied by order of the Court entered on January 25, 1944; that a transcript of the record in said cause has been printed and filed with the Clerk of the Supreme Court of

the United States; that as soon as the petition for certiorari and supporting brief can be printed, which is expected within a short time, the same will be filed with the Clerk of said Court, seeking a review by the Supreme Court [fols. 13-14] of said judgment, and a reversal thereof, on the ground that the State Highway Commissioner of Virginia has no authority to condemn the land in question and thereby destroy unnecessarily the operation of the petitioner's mill and that, in allowing such condemnation, the petitioner has been subjected to an unconstitutional discrimination, and on the further ground that said statute under which the Commissioner seized and mutilated the land is unconstitutional.

(Signed) Bernard B. Bailey.

[fol. 15] In Circuit Court of Fairfax County

Order Denying Motion for Stay

After hearing counsel on defendant's oral motion made on March 31, 1944, for an order staying this condemnation proceeding until final action has been taken by the Supreme Court of the United States on the petition for writ of certiorari (No. 829) to review the judgment of the Supreme Court of Appeals of Virginia entered in the case of Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, it is ordered that said motion be and the same is hereby denied.

(Signed) Paul E. Brown, Judge.

Dated this 6th day of April, 1944.

[fol. 16] In Circuit Court of Fairfax County

Plea Setting up Claim for Damages etc.—Filed April 22, 1944

Comes now the defendant, Bernard B. Bailey, and alleges:

1. As compensation for the 3.98 acres of land more or less described in the petition herein, the defendant claims

the sum of $350.00 an acre for the bottom land and the sum of $3,000.00 for the hill land from which the earth was taken for the construction of the fill on the bottom land.

2. As damages to the residue of the defendant's property from the construction of the highway, he claims the sum of $21,100.00, which represents the difference between the sum of $33,600.00 being the fair market value of the whole property, including land, dwellings, mill, barns and other buildings, and the sum of $12,500.00 being the fair market value of the residue after the construction of the highway.

3. The defendant claims interest at the lawful rate on the total amount awarded as compensation and damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made.

4. In addition to the foregoing, the defendant claims compensation for the use of the land described in the petition for highway purposes at the rate of $200.00 per month for each and every month the land has been and will be used for highway purposes from October 15, 1941, when the land was seized, until such date as the petitioner is enjoined from using the land prior to acquiring title thereto in a [fol. 17] legal manner. The basis for this claim is hereinafter set forth.

5. Acting under the authority contained in Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6), the petitioner on October 15, 1941, seized the land described in the petition and since that time has constructed a state highway thereon and has used the same for the travel of the public, which use is now being made of the land. The defendant avers and charges that said statute is in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States because it allows the Petitioner to enter and construct the highway and mutilate and disfigure the property for highway purposes and at the same time restrains the owner from acting upon his own motion and from compelling the petitioner to act to have commissioners appointed to view the land before the mutilation and disfigurement are completed.

6. The defendant avers that he is entitled to attack and hereby expressly claims the right to attack said statute as

being in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States because he has been damaged by the operation of the unconstitutional feature of the statute in that from October 15, 1941, when the petitioner seized the property, until June 17, 1943, when the petitioner filed the petition herein, the petitioner was restrained by said statute from applying to the Court and from compelling the petitioner to apply to the court for the appointment of commissioners to go [fol. 18] on the property and view the entire property, including the part taken and the residue, to determine the value of the entire property in its condition before it was mutilated and disfigured beyond recognition; and during said period of time the petitioner so changed and disfigured the property, as hereinafter set forth in detail, as to make it impossible, when the petition was filed herein and at the present time, for commissioners appointed by the court pursuant to the statute regulating the method of determining just compensation, to go on the property and determine the value of the entire property as it existed before the petitioner changed and disfigured it; and since the damages to the residue of the property resulting from the highway construction is the difference between the fair market value of the property at the time the entry was made and the fair market value of the property after the construction of the highway it is impossible now and was impossible on June 17, 1943, when the petition herein was filed, to obtain a fair and just appraisal of the damages to which the defendant is entitled.

7. On the residue of the defendant's property, which is approximately fifteen miles from Washington, D. C., there stands a brick colonial dwelling erected in the early part of the 19th century, which, with the frame additions thereto, consists of ten rooms and bath, large attic and basement, large fire places, antique mantels, ornamental cupboards, center hall and colonial stairway, all of which on October 15, 1941, had been restored, renovated and redecorated at a cost of several thousand dollars. The dwelling stands on a ridge, on one side of which is a four-story brick, water-power grist mill erected in the year 1794. In keeping with [fol. 19] the character of the dwelling and forming the principal part of the value of the property as a colonial estate, the grounds adjacent to the dwelling and mill race consisted of ten acres of rich meadow and sod land, which

on October 15, 1941, had been placed in excellent condition after several years of mowing and other care. Without these spacious grounds the property loses its distinctive character as a colonial estate. In addition to this outlay, and approximately 200 yards from the dwelling, the property contained three acres more or less of hill land, partly covered by oaks and other timber, at the foot of which ran the mill race in a winding course to the mill wheel. From this hillside could be seen the surrounding country for miles around, which gave to this part of the property its distinctive value as a site for the erection of another dwelling with grounds sloping off to the mill race and overlooking the ten acres of meadow land and the historic mill and water fall in the distance.

8. From October 15, 1941, until on or about September 15, 1942, the petitioner with steam shovels and other equipment, fleets of trucks and numerous gangs of convicts, excavated thousands of yards of dirt from said hill land adjacent to the mill race and carried the dirt to the meadow land and there constructed a fill for a state highway. The excavations in the hill land were made to a depth of approximately fifty feet and in a width of approximately 150 feet leaving a ghastly and extremely dangerous chasm for a distance of approximately 400 feet through the hill, the like of which it is said by highway officials is not to be [fol. 20] found in the Commonwealth of Virginia outside of the mountains. The fill constructed for the highway runs through the meadow land, which formed the grounds aforesaid, for a distance of approximately 1000 feet and rises to a maximum height of between 20 and 30 feet and has a width of approximately 125 feet at the base. The fill forms an enormous wall of dirt and rocks which runs through the spacious grounds parallel to the colonial dwelling and within 150 feet of the dwelling, and completely wipes out the immediate grounds which formed the setting for the colonial estate and constitutes a barrier isolating the dwelling and obstructing the expansive view therefrom. Deposits of dirt, muck and mud, washed from the banks of the fill, have spread out and cover the sod land close to the dwelling. The chasm through the hill land has completely wiped out the site which formed the grounds for a dwelling overlooking the surrounding country for miles around. All of these conditions existed on June 17, 1943, when the petition herein was filed, and also exist now.

9. Because of this mutilation and disfigurement of the property, it is now impossible for commissioners appointed by the court to go on the property and visualize the condition and value of the property before the disfigurement.

10. Defendant avers that to deny him compensation for the use already made of his property for highway purposes and to allow the petitioner to continue to use the property for such purposes before acquiring title thereto, which use is based entirely upon said unconstitutional statute, would operate to deprive the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

use operates to deprive the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

(Signed) Bernard B. Bailey.

[fol. 27] IN CIRCUIT COURT OF FAIRFAX COUNTY

MOTION TO STRIKE PLEADING—Filed May 12, 1944

Now comes the Petitioner, J. A. Anderson, State Highway Commissioner of Virginia, by his agent and attorney, John W. Rust, and moves this honorable Court to strike the pleading filed in this cause by Bernard B. Bailey on the 22nd day of April, 1944, and thereupon says as follows:

1. That your Petitioner is unable to ascertain the nature of said pleading, and is unable to determine whether the same is a petition or an attempt to set up the grounds of defense of the Defendant, Bernard B. Bailey, as required under Section 1969j(2), of the 1942 Code of Virginia.

2. If the same is intended as grounds of defense, your Petitioner requests that all of the immaterial allegations of the said pleading which are not germane to the issues

in a condemnation proceeding, be stricken from the said pleading.

3. If the same is not filed by Bernard B. Bailey as grounds of defense, then your Petitioner requests that the entire pleading be stricken from the record, and the proper grounds of defense be filed, in accordance with the said Section of the Code.

4. That under heading 3 of the pleading of Bernard B. Bailey, interest at the lawful rate on the total amount awarded as compensation and damage from October 15, 1941, when the property was taken for highway purposes, until payment is made, is claimed. Your Petitioner con- [fol. 28] cedes that in the normal case when property is taken for a public purpose before compensation is paid, the landowner is entitled to interest from the date of the actual taking in order that the compensation paid to the landowner would be the equivalent of payment made at the time of the taking. Your petitioner states, however, that in this case a substantial part of the delay in the payment of compensation has been the result of the action of Bernard B. Bailey in insisting that the condemnation proceedings be delayed until the termination of the injunction suit filed by the said Bernard B. Bailey against J. A. Anderson, State Highway Commissioner, which suit was decided adversely to the claim of the said Bernard B. Bailey by the Supreme Court of Appeals of Virginia. See Bailey v. Anderson, 182 Va. 70. Your Petitioner, therefore, says that Bernard B. Bailey is not entitled to any interest for such portion of the delay which has been the result of his own actions, and it is therefore moved that so much of paragraph 3 of said pleading of Bernard B. Bailey which claims interest for such period which resulted from the delay caused by Bernard B. Bailey, be stricken from said pleading and record.

5. That your Petitioner moves that paragraph 4 of the pleading of Bernard B. Bailey be stricken from the said pleading and record. The land of Bernard B. Bailey was taken for a public use when the State Highway Commissioner first took possession of said land. The landowner is entitled to just compensation for the land taken and damages done. Upon the payment of such compensation and interest set out in paragraph 4 of this Motion so that the landowner would be receiving the equivalent of the payment [fol. 29] of just compensation made at the time of the tak-

ing, the landowner will have been paid all compensation to which he is entitled. He is not entitled also to additional compensation for the "use" of the land.

6. Your Petitioner further requests that paragraphs 5 and 6 be stricken from the pleading and record, because of the fact that the constitutionality of Sections 1969j(4) and 1969j(6) are not before the Court in this condemnation proceeding, by reason of the fact that in the suit of Bailey vs. Anderson, 182 Va. 70, the Supreme Court of Appeals of Virginia upheld the constitutionality of the aforesaid Sections, insofar as they affect this proceeding, and, therefore, these paragraphs should be stricken from the pleading and record.

7. Your Petitioner requests that all immaterial matter not germane to the issues involved under paragraph 7 of the pleading of Bernard B. Bailey be stricken from the said pleading and record, and that he be confined to alleging what would be just compensation for the land or other property or for the interest or estate therein proposed to be condemned for highway purposes, and to be awarded damages, if any, resulting to the adjacent or other property of any other person from the construction and operation of the highway, and your Petitioner wishes to state that the allegations contained in this paragraph are rambling and immaterial, and not confined to the issues involved.

8. Your Petitioner objects most strenuously to the allegations and averments of paragraph 8 of the pleading of Bernard B. Bailey that the work upon the highway was carried out by numerous gangs of convicts, as it is immate-
[fols. 30-31] rial as to who performed the labor for this project, and this statement is evidently intended to create a false impression in the minds of the Commissioners and the Court, and it is requested that these statements be stricken from the pleading and record.

9. It is requested that paragraph 9 of the pleading of Bernard B. Bailey be stricken from the pleading and record, because of the fact that it is evident that the Commissioners appointed by the Court can go upon the property and visualize the conditions and value of the property and award just compensation to the said Bernard B. Bailey, in accordance with the statute, and this statement is misleading and calculated to prejudice the Commissioners and the Court.

10. Your Petitioner also asks that paragraph 10 of the pleading of Bernard B. Bailey be stricken from the said pleading and record, because of the fact that it is again alleged in that paragraph that the statute is unconstitutional, which question has already been decided by the Supreme Court of Appeals of Virginia in the said case of Bailey v. Anderson, 132 Va. 70.

* * * * * * * * *

15. Your Petitioner moves that that portion of paragraph 18 of the pleading of Bernard B. Bailey requesting a decree enjoining the Petitioner from using the land until title has been acquired, be stricken from said pleading and the record in this case because this presents a question already litigated and decided adversely to the claims of Bernard B. Bailey in the case of Bailey v. Anderson, supra, and also because the question of the constitutionality of the statutes attacked is not an issue in this case.

[fol. 33] 16. Your Petitioner further states that the only question at issue in this condemnation proceeding is the amount of damages and compensation to which the said Bernard B. Bailey is entitled, by reason of the construction and operation of the said highway, and he requests that the pleadings and proof be limited to this question alone, and that all of the immaterial and improper statements set out in the said pleading of Bernard B. Bailey be stricken from the record, and that the said entire pleading should be stricken from the record and the Defendant be required to file his grounds of defense, devoid of the immaterial and prejudicial material contained in the said pleading of the said Bernard B. Bailey, as it is believed that the pleading, as now drafted, with the allegations of convict labor, incompetent highway engineers, and other such allegations, will prejudice the Commissioners, and that the Defendant should be required to file his grounds of defense and confine his pleadings strictly to the issues involved.

J. A. Anderson, State Highway Commissioner of Virginia. By (Signed) John W. Rust, Agent and Attorney.

[fol. 34] IN CIRCUIT COURT OF FAIRFAX COUNTY

ORDER APPOINTING COMMISSIONERS—June 9, 1944

It appearing to the Court that the said J. A. Anderson, State Highway Commissioner, has duly filed his petition in the said Court, seeking to condemn the fee simple title to certain land described in the said petition and belonging to the said Bernard B. Bailey, and that due notice was given to all of the Defendants, and that the said Petitioner did on the 19th day of July, 1943, apply to the Judge of the Circuit Court of Fairfax County, Virginia, for the appointment of Commissioners in this cause;

And it further appearing to the Court that this cause was continued at that time, and that on the 22nd day of April, 1944, the Defendant, Bernard B. Bailey, filed a pleading in this cause, and the State Highway Commissioner filed a motion to strike the pleading of said Bernard B. Bailey, which motion was heard on this the 9th day of June, 1944, and the Court being of the opinion that the motion to strike the said pleading of the said Bernard B. Bailey should be overruled, and the said motion is overruled by the Court, subject to the exceptions as hereinafter set out, to which ruling the Plaintiff excepts;

And the Court is of the further opinion that the Statutes of the State of Virginia, under which this proceeding was instituted and the land of the Defendant was taken are not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, and the Court so [fol. 35] holds, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts.

And the Court also being of the opinion that Paragraph No. 4 of the pleadings of Bernard B. Bailey which claims compensation for the use of the land in the sum of $200.00 per month is not a valid claim, and the Court doth order that this paragraph be stricken from the pleading of the said Bernard B. Bailey, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts.

And the Court further rules that the pleading of the said Bernard B. Bailey shall be considered as his grounds of defense.

And the Court doth adjudge, order and decree that the Clerk of the said Court shall summons Robert D. Graham, Buford M. Bridwell, Harry B. Mitchell, Oswald V. Carper,

J. C. Hoskins, Carroll V. Shreve and John F. Bethune, seven disinterested freeholders, who shall be residents of the County of Fairfax, wherein the land is situated, from which seven after the exercise of one peremptory challenge by each the petitioner and the landholder, the remaining five, any three of whom may act, whose duty it shall be to go upon and view said land at 10:00 o'clock, on the 11th day of July, 1944, and ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for highway uses, and to award damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, from the construction and operation of said highway, as described in said petition.

The Court doth further adjudge, order and decree that the Commissioners in the custody of the Sheriff of the [fol. 36] County, shall view the land described in said petition with the landowner and the attorneys of record for the land owner, the agent and attorney for the State Highway Commissioner, and a representative of the State Department of Highways.

Enter:

(Signed) Paul E. Brown, Judge.

[fols. 37-38] In Circuit Court of Fairfax County.

Oath of Commissioners—Filed July 11, 1944

I, W. Franklin Gooding, Deputy Clerk of the Circuit Court of Fairfax County, Virginia, do hereby certify that Buford M. Bridwell, Harry B. Mitchell, J. C. Hoskins, Carroll V. Shreve and John F. Bethune, have this day made oath before me in my Office that they will faithfully and impartially ascertain what will be a just compensation for the land or other property of the defendants, or for the interest or estate therein, proposed to be condemned for highway uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or owners, or to the property of any other person, from the construc-

tion and operation of said highway as fully described in the petition filed in this matter.

Given under my hand this the 11th day of July, 1944.

(Signed) W. Franklin Gooding, Deputy Clerk of the Circuit Court of Fairfax County, Virginia.

[fol. 39] IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

J. A. ANDERSON, State Highway Commissioner of Virginia, Petitioner

v.

BERNARD B. BAILEY and EUNICE R. BAILEY, His Wife, et al., Defendants

Statement of Evidence

Fairfax, Virginia, Tuesday, July 11, 1944.

The above-entitled cause came on for hearing at 10:30 o'clock a. m. in the Court House, Fairfax, Virginia, before the Honorable Paul E. Brown, Judge of the Circuit Court of Fairfax County, Virginia, and the following Commissioners:

Buford M. Bridwell, Harry B. Mitchell, J. C. Hoskins, Carroll B. Shreve, John F. Bethune.

APPEARANCES:

J. W. Rust, Esq., counsel for the Petitioner; Frank Ball, Esq., counsel for the Defendants.

[fols. 40-127] Proceedings

(The Commissioners and all persons expecting to appear as witnesses were duly sworn.)

The Court: Let the record show that the names of Robert D. Graham and Oswald B. Carper were stricken from the original list.

The Sheriff will take you folks over to the property in question. You and Senator Rust are going, I suppose?

Mr. Ball: Yes.

Mr. Rust: We have an order entered for Mr. Smith to go.

The Court: We will recess, then, until 2:30.

(Thereupon, at 10:50 o'clock a. m. the hearing was recessed, to reconvene at 2:30 o'clock p. m. of the same day.)

[fol. 128] T. N. Ross, was called as a witness by counsel for the Petitioner and, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rust:

Q. Mr. Ross, tell the Commissioners your name.

A. T. W. Ross.

Q. What is your occupation?

A. Securing land for right of way road purposes.

Q. How long have you been with the Highway Department?

A. Twenty-one years.

Q. What section of the State do you cover in your operations?

A. Thirteen counties surrounding Culpeper, which includes Fairfax and Arlington.

Q. What is your principal business in reference to rights of way?

A. Well, my principal work is securing the land.

Q. Did you make any effort to secure the land from Mr. Bailey?

A. Yes, sir.

Q. What effort did you make to secure it?

Mr. Ball: Is it necessary to prove that?

Mr. Rust: We are supposed to make an effort to compromise before we file a condemnation proceeding.

The Court: You have to allege it and have to prove it.

[fol. 129] A. We made Mr. Bailey an offer.

Q. Did Mr. Bailey accept your offer?

A. No, sir.

Q. Did you make every effort you could to settle with him without going into a condemnation proceeding?

A. I thought so at the time.

Q. Have you been in any way able to make a settlement with Mr. Bailey?

A. No, sir.

Q. Was it therefore necessary for the condemnation proceeding to be filed, in order to settle this matter?

A. Yes, sir.

Q. That is the only way you could settle it after you failed to reach an agreement with Mr. Bailey?

A. Yes, sir.

Q. Your business is to purchase land from the land owners for the Highway Department, is that correct?

A. Yes, sir.

Q. And you purchased all of the rights of way along Route No. 7 on which this mill is located?

A. Yes, either directly or indirectly. I mean, I had help. I didn't purchase each and every property. In fact, I didn't purchase but very little of it personally.

Q. What land right near Mr. Bailey's did you purchase?

Mr. Ball: I object to that, if your Honor please. It has [fol. 130] been held over and over again that you can not consider what has been paid by the Government for land for the same project.

The Court: I think that is objectionable. I sustain the objection.

Mr: Rust: We would like to except to that.

By Mr. Rust:

Q. What damage do you think you caused Mr. Bailey, Mr. Ross, in constructing this road?

A. Do you mean in dollars and cents?

Q. Well, just what did you do there?

A. Well, we divided the property and we have a rather high fill across the bottom, and an exceptionally high cut through the high land. I think the property is damaged about 3,000, which is $1,000 more than I thought before I saw the work done. In other words, I think now that the property is damaged more than I anticipated it would be damaged.

Q. You think that is about the damage that has been caused?

A. I do, yes, sir. That is, by selling the property—its market value prior to taking and market value after taking.

Q. Did you go near any of his buildings, Mr. Ross?

A. Yes, I have been near all of the buildings. I haven't been in any of the buildings.

Q. In constructing the road, what buildings did you approach?

A. Well, I was up to Mr. Bailey's house.

[fols. 131-137] The Court: What Senator Rust meant, I think, is, did you go near the buildings with your road?

The Witness: Is that what you meant?

By Mr. Rust:

Q. Yes, that is what I am asking you.

A. Why, yes. We went back of the main dwelling, back of the old mill, and in front of the small bungalow on top of the hill.

. . . . . .

[fol. 138] Q. How deep is that cut?

A. I don't know the exact figures. It is a pretty deep cut.

Q. You don't know how high the fill is?

A. I don't know offhand, no.

Q. That is an unusually deep cut for eastern Virginia, or anywhere outside of the mountains, is it not?

A. Yes, sir.

Q. You stated to the Commissioners that you had tried to settle the case?

A. Yes, sir.

Q. At that time you thought the damages were considerably less than you are satisfied they are now, is that right?

A. I thought they were less, yes, sir.

Q. And you offered considerably less?

A. I offered less.

[fol. 139] Q. And Mr. Bailey told you his damages would be greater?

A. Yes, sir.

Q. And he was right?

A. I don't think he was damaged what he told me he would be.

Q. I do not ask you to concede that. Is it not a fact that you have jumped the amount of damage fifty per cent?

A. No, sir.

Q. Was it not $2,000 that you offered at that time?

A. Yes, sir.

Q. And now it is $3,000?

A. Yes, sir.

Q. That is just one-half of the $2,000 increase?

A. Yes, sir, but if he had offered to accept $3,000 I think we would have settled and we wouldn't have been here.

Q. Why did you not offer what you thought was right?

A. That was my honest opinion, and I am just as honest now in admitting that I was wrong. I think I was wrong.

Q. What was the value of the land taken before it was taken?

A. I valued it at $200 an acre, Senator.

Q. $800 for the land taken?

A. Whatever it would amount to.

Q. And you fixed $3,000 damage?

A. Yes. That included the land.

Q. Does that include the land?

A. Yes.

[fol. 140] Q. $2,200 is what you estimate the damage, and $800 for the land taken?

A. That is right.

Q. Can you tell us what you took into consideration in arriving at the damage?

A. Yes, sir; I think so.

Q. How did you arrive at that? I do not mean the exact dollars and cents calculation. What elements did you take into consideration?

A. Of course I realize that any property and all property in that vicinity has increased in value, but that would have nothing to do with the damage. The damage would be the same. But I think that that property sold in two parcels would bring within $3,000 of what the entire property would have brought any way you sold it, whether in one piece, two pieces, or any way you sold it. I think the property on the south or west side of the road, where the bungalow is, has been enhanced in value. I really, truly do.

Q. You think the low land has been enhanced?

A. I mean the higher property. I don't think you could do anything to help that low land—or hurt it much, either.

Q. You think the high land is enhanced by having a deep cut through it?

A. I think by reason of being able to divide it into two parcels. If you had to sell it all to one man I would say it would be an entirely different story.

[fols. 141-149] Q. How wide is the cut from the top of one side to the top of the other side?

A. A look at the prints will tell you.

Q. Did you not cut out the very finest building site that was up there?

A. I would assume they put the house on the finest. They had an opportunity to.

Q. You mean that little house?

A. Yes, sir.

Q. You did not think that that was the permanent building that was going to be put there?

A. That seemed to be somebody's choice. It probably would not have been mine, but it was somebody's.

. . . . . .

[fol. 150] IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

Fairfax, Virginia,
Wednesday, July 12, 1944.

Hearing in the above-entitled cause was resumed at 9:30 o'clock a. m.

Appearances: As heretofore noted.

PROCEEDINGS

The Court: Do you have some more witnesses?

Mr. Rust: We have only Mr. Smith.

Mr. Ball: Before he goes on, could we talk to your Honor a moment? We may be able to shorten this a bit.

(There ensued a conference in the Judge's chambers between counsel for both parties and the Court.)

The Court: Do you want to announce the stipulation now?

Mr. Rust: I think we had better do it now. I think Mr. [fol. 151] Bailey has it.

STIPULATION RE STOPPAGE OF OPERATION OF MILL

The Court: Gentlemen, one of the elements of damage in this case is the stoppage of the operation of the mill by the building of this fill. It became necessary to take the mill race underneath the highway through this 48-inch pipe which you saw, and then to take the tail race down alongside of the right of way to the original ditch, and there take it under the highway fill. One of the claims is that these pipes going underneath that fill would clog up and prevent the operation of the mill.

Counsel for both sides here have agreed on this provision, which you can incorporate in your findings when you go to assess the damages, if any, and this will be in addi-

tion to any damages that you might find. The stipulation is as follows:

It is stipulated and agreed that the State Highway Department will keep the pipes on this new highway, and also the tail race, where located upon the State right of way, free from dirt or other obstruction so as not to affect the operation of the mill, and so as not to prevent the normal flow of water to the mill and through the tail race.

It is further understood and agreed that the stipulation and agreement relates to the period and time that the mill will be operated.

On account of the above agreement and understanding, the Commissioners, in arriving at their award, may not take into consideration any damages accruing to the mill [fol. 152] and its operation by reason of the construction of the new highway, and the Commissioners, in making their report, shall give full force and effect to this stipulation and agreement.

In other words, you will disregard anything about the mill race or tail race as it affects the operation of the mill. You may have this when you draw up your report.

W. Frank Smith was called as a witness by counsel for the Petitioner and, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Rust:

Q. Tell the jury your name.

A. W. Frank Smith.

Q. What position do you occupy with the Highway Department?

A. Resident Engineer, in Fairfax County.

Q. What are your duties as Resident Engineer?

A. Supervision and maintenance and construction of highways, including Fairfax County.

Q. Did you supervise the construction of this road through the property of Mr. Bailey?

A. Yes, sir.

Q. When was that road built there, Mr. Smith?

[fols. 153-159] A. In 1941-42.

Q. Will you give us the distance of the entire new road through Mr. Bailey's property?

A. 1414 feet.

Q. Will you tell us how high the fill is on through the bottom?

A. Its maximum point is 23 feet.

The Court: How much?

The Witness: Twenty-three feet.

Q. And what is the maximum depth of the cut?

A. It is 37 feet.

. . . . . .

[fol. 160] Q. Now, with regard to that cut, how wide is that cut at the top? Did you look that up?

A. Yes, sir. I have checked that. The cut is 127 feet across the top.

Q. And 37 feet deep?

A. Yes, sir.

Q. And about how many cubic yards of dirt did you take out of there, approximately?

A. You mean from Mr. Bailey's property? We only got half of the cut from his property.

Q. What?

A. Only half of that cut is from his property. His property line is right on top of the hill.

Q. Well now, is not his property line a little over the crest of the hill?

A. Very, very little.

Q. Is not that cottage up on the crest of the hill, in fact a little bit over the crest?

A. That, I would say, was right on the crest.

Q. And his line is west of the cottage, is it not?

A. Just immediately west, that side fence line.

[fols. 161-162] Q. And is not the deepest part of the cut on his place?

A. I would say it was, by a distance of fifteen or so feet from the peak.

Q. How many cubic yards would you say came out of his property, as nearly as you can guess?

A. I have estimated that at about twenty to twenty-two thousand cubic yards, from Mr. Bailey's section of the cut.

Q. Could you tell us for what purpose you used that? Was that for the fill?

A. To make part of the fill.

. . . . . .

[fols. 163-167] Q. Did you give the length of that fill, by the way, across there?

A. No.

Q. Do you have the length of it there?

A. I can take it right off.

Q. Would it be too much trouble?

A. Not a bit.

Q. You gave us the entire length.

A. The entire length, yes. That is, on Mr. Bailey's property?

Q. Yes.

A. It is 1100 feet.

Q. And what is the elevation at the lower end? Do you have that available?

A. Yes, sir; six feet.

Q. In other words, it runs from twenty-three maximum to six minimum?

A. Yes, sir.

[fols. 168-175] BERNARD B. BAILEY, a Defendant, appearing in his own behalf, having been previously sworn, was examined and testified as follows:

. . . . . .

[fol. 176] Q. Now, with regard to No. 2, was all of the stretch across from the house to Colvin Run visible from the house and yard?

A. Yes, and it formed a very beautiful estate looking from the house.

Q. Was the upper part, where the dam is, visible or not?

A. No, sir; not from the house.

Q. You could not see in that narrow neck up there.

At what did you value the fifteen acres at the time that the road was put through, prior to the taking?

A. Five thousand dollars; between three hundred and three hundred and fifty dollars an acre.

Q. Your valuation, then, on the dwelling and fifteen acres, in 1941 was $15,000?

A. Yes, sir.

. . . . . .

[fols. 177-185] Q. Mr. Bailey, you were estimating the damage to the dwelling and these approximately fifteen acres at about $10,000?

A. You mean the value, not the damage.

Q. The decrease in value. You claimed it was worth $15,000 before and about $7,000 afterwards?

A. Yes, sir.

. . . . . .

[fol. 186] Q. What was the value of those buildings at the time the road went through?

A. You are not speaking now of the barn over on the other piece?

Q. Did you include that too, in that? I forgot about that.

A. There is another barn on No. 3.

Q. That is the old red barn?

A. Yes.

[fol. 187] Q. That was there when you bought the property?

A. Yes, sir. I valued all of those buildings at $3,500. The Coulter barn someone said yesterday was in poor condition. It is true that there are one or two places where the posts have got to be renewed, but otherwise the barn is in good condition. I put a new roof on it about a year before this road was started, and the framing in the barn is in good condition. It is constructed in a way that barns are not constructed today. It is good construction.

The dairy barn is built for twenty cows. It is one story and has been put up to pass the requirements of the District of Columbia.

Q. What valuation did you put on those buildings?

A. $3,500.

Q. And what valuation did you place on it after the road went through?

A. The buildings today, I think, are very greatly depreciated, because of the fact that the barns are now on the wrong side of the road, the new highway, the fields in Tract No. 2 and Tract No. 4, and this 10-acre tract back where the dam was.

. . . . . .

[fols. 188-192] A. I didn't state what I thought the value of the barns is now, I believe. I think that as a result of that the barns are not worth any more than $500 to anyone who would contemplate operating a dairy there, and those barns are for that purpose and were constructed for that purpose, for farm operations.

Q. In other words, the man who buys the place for that purpose will tear these barns down and put them across where he can get cattle to them, is that right?

A. That's it.

. . . . . .

[fol. 193] Q. Now, with regard to the Coulter property and—what was that other property you bought?

A. I bought it from Center Merry and Mr. Holmes.

Q. In what year did you buy that?

A. '39, the same time.

Q. That is two years before this road went through?

A. Yes, sir.

Q. I ask this subject to objection: What was the purchase price of those two pieces per acre?

A. Per acre, around, between four and five hundred dollars.

Q. What did you pay for the two pieces?

A. I paid $4,700.

Q. For how many acres?

A. There is six and a half acres, and it has the little cottage and the barns. I bought the cottage, everything in the cottage, the barns and the whole land.

Q. You placed a value on those ten acres and the cottage at the time the road was taken of $6,000, is that correct?

[fols. 194-208] A. Yes, sir.

Q. What valuation do you place on it after the road was constructed?

A. $2,500.

Q. Your claim is that there is a loss there of $3,500. What do you take into consideration in estimating that?

A. The excavation for the new highway, this deep cut of 37 feet, was made approximately fifty feet from the cottage, or maybe seventy-five, and it leaves the cottage hanging in mid-air. It is a very dangerous place for anyone to live without the construction of a proper fence down that cut. No one would attempt to have children running out there without a proper fence, and it would have to be a

fence which they couldn't climb over, because it is certain death if anybody ever steps off that cut from that cottage. Even a grown person has to be very careful walking up there now to the cottage along the cut, and if you are the least bit dizzy it is very hard to keep your balance when you look down that cut.

* * * * * * *

[fol. 209] A. No, sir. I would like to make one statement here that doesn't enter into the question of damages or value, but it does enter into the issues which have been drawn by these pleadings in regard to the constitutionality of this law.

The Court: The Commissioners are not concerned with that.

The Witness: I don't know how we are going to get it in the record.

The Court: It is already in the record.

The Witness: The testimony about how the settlement was handled by the Highway Department under the law, sir?

The Court: Is that not set up in your pleadings?

The Witness: No, sir.

By Mr. Ball:

Q. Did they attempt to settle with you?

A. Yes, sir.

Q. Did you refuse to make a settlement?

A. I did.

[fol. 210] Q. And why did you refuse?

A. Well, they offered me $2,000 for the whole thing. I didn't accept it because I didn't want the road there and I did everything I could to prevent it from being put there, and I told Mr. Browning—A. T. Browning, I think it is, or A. W.—who is the Junior Highway Commissioner, that I wouldn't accept his offer and didn't want the road through the property. He told me that if I didn't accept the $2,000 I would have to accept the consequences. I asked him what he meant. "Well," he said, "under the statutes of Virginia, the State Highway Commissioner has the right, and we are going to exercise that right, to take your property and build this highway through there whether you like it or not, and then you will have to wait until we

get through with the highway and sixty days thereafter before you will get any settlement."

He said, "Just bear that in mind in deciding whether you are going to take $2,000 or not."

I still refused and, of course, we brought the injunction suit later, and contested the constitutionality of the Act, which we are also doing in this case.

Mr. Ball: I think that is all.

Cross-examination.

By Mr. Rust:

Q. Mr. Bailey, you refused absolutely to permit the road to go through your property, and you refused absolutely to make any settlement whatever with the Highway people? [fols. 211-230] A. I did.

Q. And you did everything in the world you could to prevent them from putting the road through?

A. I did, and not only I did, but other property owners with me.

Q. And you did not try to work out any proposition with them with reference to the construction of the road or in reference to your land whatever?

A. No, sir. We protested against the construction of that highway all the way through, because we knew that it would blight all that property.

* * * * * * *

[fol. 231] I just would like to state, if I may, the reason for the confusion that I got into in giving these valuations to the Court and to the Commissioners. I estimated the values and the damages on a different theory from that which Mr. Rust presented, and I did it for this reason, that the residence and fifteen acres naturally go together, and I placed a value on that, and the land where the cottage is and all that hill land is another development there; and then, of course, the bottom land in the rear, where the lake was, is different property also, so that there are three different elements of value there, three different pieces of property.

Q. Of course, the only question before the Commissioners is, what was the land worth when the road went through, and what was it worth after the road was constructed?

A. That's right, and that is what I tried to show. In other words, before the road was built I considered that [fol. 232] we had a colonial residence there with grounds suitable for its enjoyment, and that we had a hill-land there that was suitable for the development of a magnificent dwelling.

Q. How many rooms were there in the original brick part of the house? Just four rooms, did you say?

A. Four rooms and the bathroom part.

Q. And that house now, you say, faces on the old road?

A. The rear of the house is on the old road.

Q. It is on the new road.

A. On the new road, yes.

Q. On account of the conditions that exist there, and the unsightliness that you have testified to, do you not think it is better for the house to face on the old road than to face on the new road?

A. No, I don't, because the way it is now, we have two roads, and facing on the old road doesn't offset the damage that is caused by the back of the house being on the new road.

Q. But if the view across there is so unsightly and the conditions are so unsightly, would you not rather have the house facing just as it is?

A. No, sir, for this reason, that when we used the property before the road was built, the area in the back of the house was the real property for the real development of a place of spacious grounds for the enjoyment of someone who wanted a house like that, and we never intended to [fol. 233] develop the front part of it for that purpose. We did put that rock wall there around that well to hold the dirt and to beautify the front part of the place, and we put shrubbery there, but we did not anticipate that we would use the front part of the property for the purpose of quiet and rest and enjoyment.

Q. That was not built as a colonial house as much as just a miller's house, was it not?

A. No, sir.

Q. Was it not built in connection with the mill?

A. No, sir. That house was built by Mr. Carper.

Q. The mill was there at the time it was built, was it not?

A. It wasn't the miller's house; it was the man who owned the mill who built the house. It is not a miller's house, if that is what you are trying to say.

Q. The miller lived in the house when he ran the mill, and you are the first man who has ever lived there who has never run the mill.

A. I have run the mill.

Q. I mean, as it was always run.

A. I have run the mill, and intend to run it.

Q. I do not see that that has a thing to do with the value of that house on October 15, 1941, when this road was started.

Mr. Ball: Do you mean by that, Senator Rust, that the man who did labor in the mill was the man who lived in the house?

Mr. Rust: No; I mean that instead of it being an old [fols. 234-242] colonial house it was just a four-room brick house in which the miller lived when he ran the mill.

* * * * * * * *

[fol. 243] IN CIRCUIT COURT OF FAIRFAX COUNTY

REPORT OF COMMISSIONERS—Filed July 12, 1944

* * * * * * *

We the undersigned duly appointed Commissioners and free-holders to ascertain what will be a just compensation for the land or other property or for the interest or estate therein proposed to be condemned for highway uses and to award damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person from the construction and operation of said highway as described in the petition filed in this cause, after being duly sworn, in the custody of E. P. Kirby, Sheriff, and there being present John W. Rust, Agent and Attorney for the State Highway Commissioner, Frank L. Ball, Attorney for the Defendant, Bernard B. Bailey, Bernard B. Bailey and W. F. Smith, representative of the State Department of Highways, viewed the land described in the petition filed in this action on the 11th day of July, 1944, the day designated in the order entered in this action, and reported this fact to the Court, and after hearing such testimony of the issues joined in Court, we are of the opinion and find that for the fee simple title of the Defendant in the 3.98 acres of land, more or less, the sum of $1,500.00 will be a just

compensation, and that there was $6,500.00 damages resulting to the adjacent or other property of the owner from the construction and operation of said highway, and that there will be no damages to the property of any other person from the construction and operation of said high-
[fols. 244-245] way.

It is stipulated and agreed that the State Highway Department will keep the pipes under the new highway and also the tail race where located upon the State right of way free from dirt or other obstructions, so as not to affect the operation of the mill and so as not to prevent the proper and normal flow of the water to the mill and through the tail race. It is further understood and agreed that this stipulation and agreement relates to the period and time that the mill will be operated. On account of the above agreement and understanding the Commissioners in arriving at their award may not take into consideration any damages *accur-ing* to the mill and its operation by reason of the construction of the new highway, and the commissioners in making their report shall give full force and effect to this stipulation and agreement. We have considered this stipulation and do hereby make it a part of our findings and our report.

Given under our hands this 12th day of July, 1944.

(Signed) H. B. Mitchell, B. M. Bridwell, Carroll V. Shreve, J. C. Hoskins, John F. Bethune, Commissioners.

Recorded among the Land Records of Fairfax County, Virginia, in Deed Book No. 434, at page 460.

[fol. 246] In Circuit Court of Fairfax County

Exceptions of Defendants to Report of Commissioners—Filed July 18, 1944

* * * * * * *

To the Honorable Paul E. Brown, Judge of the Said Court:

Comes now the defendant, Bernard B. Bailey, and excepts to the report of the Commissioners made herein on the 13th day of July, 1944, on the ground that the amounts awarded as compensation for the land taken for the highway

and for damages to the residue resulting from the highway construction are grossly disproportionate to the claims made by the defendant, which claims were based upon a view of the property before as well as after the property was mutilated and disfigured by the highway construction.

(Signed) Bernard B. Bailey, Eunice R. Bailey, by Counsel.

(Signed) Frank L. Ball, Counsel for Defendants.

[fol. 247] IN CIRCUIT COURT OF FAIRFAX COUNTY

EXCEPTIONS OF PETITIONER TO REPORT OF COMMISSIONERS—Filed July 20, 1944

* * * * * * *

J. A. Anderson, State Highway Commissioner of Virginia, files this his exceptions to the report filed by the Commissioners in the above entitled suit, on the 12th day of July, 1944, he having asked leave of the Court to file written exceptions to the said report within ten days after the rendering of the same by the Commissioner and before the Judge passed thereon, and for exceptions to said report states as follows:

1. That the report valued the 3.98 acres of land, more or less, actually taken for road purposes, at $1,500.00, and the damages resulting to the adjacent or other property of the owner at $6,500.00. The Petitioner produced six witnesses, three of whom were real estate agents, two were local men, thoroughly familiar with values in the Colvin Run community, and who had known the property all their lives, and Mr. T. W. Ross, State Highway Engineer None of these witnesses estimated the damages at more than $3,000.00 including the land taken. The only testimony as to the value of the land offered by the Defendant, was his own testimony, which valued the land at a very high price. Of course, he was an interested witness, and the three real estate men, T. P. Johnson, Ray Barney and James Barney, and the local witnesses, Harry V. Leigh and Lawrence Leigh were entirely disinterested witnesses, and it is submitted to the Court that the preponderence of the evidence, was [fol. 248] strongly in favor of the Petitioner, and while it is true that the Commissioners viewed the land, yet it is submitted that such a heavy preponderence of the evidence

should prevail, and that the award was excessive, both as to the value of the land taken and the damage to the residue of the land. The witnesses for the Petitioner testified that the land taken should not have been valued at more than $200.00 an acre, and that, in their opinion, the residue of the land would bring as much on the market after the construction of the road as it would have brought prior to the construction thereof. It is further submitted that a large portion of Mr. Bailey's testimony was irrelevant and immaterial and should not have been admitted, as it gave the Commissioners a false impression as to the actual value of the property and the actual damages to the property by the construction of the road. It is submitted that the question at issue was the value of the property prior to the construction of the road and the value of the property immediately after the construction of the road; and that this value should have been based upon what the property would have brought prior to the construction of the road and what the property would have brought subsequent to the construction of the road; and that the sentimental value placed thereon by Mr. Bailey was not a proper element of damages; and that the Commissioners were prejudice- by his testimony; and that they completely disregarded the testimony of the six witnesses introduced by the Petitioner; and that the award was certainly contrary to the preponderence of the evidence and disproportionate [fol. 249] to the injuries actually inflicted upon the land; and your Petitioner is of the opinion that an injustice was done to the State Highway Department by the rendering of the excessive award of the Commissioners, as there was not sufficient evidence to support the award.

2. Evidence was also introduced contrary to the stipulation agreed to between the parties and filed in the papers, as it was understood and agreed that "the Commissioners in arriving at their award may not take into consideration any damages accruing to the mill and its operation by reason of the construction of the new highway", and Mr. Bailey was permitted to testify at considerable length in reference to the improvements to the mill and the condition thereof, when this question had been eliminated by the stipulation and agreement.

3. That a considerable amount of improper and immaterial testimony was permitted to be introduced by the

Defendant and that numerous exceptions were taken to this testimony and the rulings of the Court; and that this immaterial and improper testimony should not have been presented to the Commissioners.

4. That the Court declined to permit the Petitioner to introduce in evidence, the three deeds conveying the land to Mr. Bailey, which deeds conveyed the three tracts of land, which were traversed by the new highway, namely a deed dated August 1, 1934, and recorded in Liber O, No. 11, Page 229 of the deed books of Fairfax County, Virginia, from Samuel Miller and others to Bernard B. Bailey, conveyed him 32 acres and 2 roods of land, more or less; the [fol. 250] deed from William Bessie Coulter and James H. Coulter, her husband, to Bernard B. Bailey dated September 1, 1939, and recorded in Liber Q, No. 13, Page 316 of the deed books of Fairfax County, Virginia, conveyed to him 2.931 acres; and the deed from Grace M. Holmes and William F. Holmes, her husband, and others to Bernard B. Bailey dated September 1, 1939, and recorded in Liber Q, No. 13, Page 313 of the deed books of Fairfax County, Virginia, conveyed 3.524 acres. It is submitted that in order for the Commissioners to understand and arrive at a proper conclusion, as to the value of the land and the damages thereto that they should have had these deeds before them, in order to have a picture of the location of the land, the distance along the old highway and the frontage thereon prior to the construction of the new road, and other measurements and distances, as each of the said deeds contain a metes and bounds description of the land, and the introduction of these deeds would have given them a better picture of the land, its location and distances. The deeds offered in evidence were certified copies and are signed by Thomas P. Chapman, Deputy Clerk, and in the opinion of the Petitioner should have been introduced and presented to the Commissioners for their information. They were excluded by the Judge of the Court because of his statement that they showed the United States Revenue Stamps and the price that Mr. Bailey had paid for the land. It is further submitted that it was proper to show to the Commissioners the actual amount paid for the land by Mr. Bailey as he testified he paid $4,700.00 for the two smaller parcels of land purchased on September 1st, 1939, [fol. 251] but declined to state what he paid for the 32 acres

and 2 roods of land, which he purchased on August 1st, 1934, although he testified at great length as to what improvements he had placed upon the property since purchasing the land and stated that shortly after purchasing the land he spent $2,000.00 in repairing the house, and that he built a new barn on the property, made improvements to the mill, etc., and it is submitted in view of his testimony, that the Commissioners should have been informed as to the price that he paid for the land on August 1, 1934, which was $9,000.00 making a total purchase price for the land of $13,700.00, and he was awarded $8,000.00 damages. It is believed that this testimony was important and that the Commissioners should have had this information before they arrived at their award, and it is submitted that $8,000.00 damages to land, which cost $13,700.00 is excessive and not justified by the facts, as none of the buildings were injured by the construction of the highway as the highway did not come within 100 feet of any of the buildings.

It is submitted that the award is excessive and not justified by the evidence and facts, and that the exceptions to the report should be sustained, and that the Court should either reduce the damages in accordance with the evidence and facts to a fair amount, or that the Court should set aside the award and appoint new Commissioners to go upon the land and assess proper damages.

Respectfully submitted, J. A. Anderson, State Highway Commissioner of Virginia, by (Signed) John W. Rust, Agent and Attorney.

[fol. 252] IN CIRCUIT COURT OF FAIRFAX COUNTY

DECREE—August 11, 1944

This cause came on to be heard upon the papers formerly read, the certificate of W. Franklin Gooding, Deputy Clerk of the said Court, who administered the oath to the Commissioners Buford M. Bridwell, Harry B. Mitchell, J. C. Hoskins, Carroll V. Shreve and John F. Bethune, freeholders, which said certificate was filed July 11th, 1944, on this the 24th day of July, 1944, the report of the Commissioners dated July 12th, 1944, and filed and returned to the Clerk's Office on July 12th, 1944 and the thirty days required by statute for the report to remain in the Clerk's Office being

waived by counsel for the petitioner and counsel for the defendants, the exceptions filed by the petitioner July 20th, 1944, and the exceptions filed by the defendant Bernard B. Bailey on July 18th, 1944, to the report of the Commissioners, and upon the defendant's claim for interest on Six Thousand Five Hundred Dollars ($6500.00), being the amount awarded in said report as damages to the residue of the defendant's property resulting from the construction of the highway through the defendant's land, and argument of counsel.

Upon Consideration Whereof, it appearing to the Court that the said Commissioners viewed the land described in said petition on July 11th, 1944, and reported to the Court on July 11th, 1944, that they had viewed the land in the custody of the Sheriff of said County, and the Court, in term time, after receiving the said report set the case for hearing on the issues joined on the 11th day of July, 1944, and the [fol. 253] said Commissioners after hearing the testimony in open Court filed their report on the 12th day of July, 1944, the case having taken two days for hearing, said report stating that for the fee-simple title to the defendant in the 3.98 acres of land, more or less, the sum of $1500.00 will be a just compensation, and that there was $6500.00 damages resulting to the adjacent or other property of the defendant from the construction and operation of the said highway, and that there was no damages to the property of any other person from the construction and operation of said highway as described in the said petition, the Court doth approve, ratify and confirm he said report in all respects and doth confirm unto the Commonwealth of Virginia, as provided by statute, all right, title, interest and estate of the said defendants, in and to the particular parts of the land belonging to the defendants, which are affected by this proceeding, and fully shown on the blue print and plat identified as Sheets Nos. 3 & 4, Project 514-E, Route 7; marked Exhibit "B", and attached hereto, said strips or parcels of land being described as follows:

. . . . . .

[fol. 254] And, thereupon, the petitioner excepted to the rulings of the Court in confirming the said Commissioners' report, and the defendant, Bernard B. Bailey, excepted to the rulings of the Court in confirming the said Commissioners' report.

Whereupon, the defendant stated to the Court that no claim was being made for interest on the One Thousand [fol. 255] Five Hundred Dollars ($1500.00), being the amount awarded in said report as compensation for the value of the land taken for the highway, and, in order to evidence that fact, the defendant moved the Court for permission to amend paragraph three of the defendant's grounds of defense, filed herein on April 22nd, 1944, so that said paragraph would read as follows: "The defendant claims interest at the lawful rate on the amount awarded as damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made." The defendant also moved the Court to allow him costs in the sum of Forty Dollars ($40.00), being the amount paid by the defendant to the reporter who, at the instance of the defendant, recorded the testimony and proceedings at the hearing held in this Court before said commissioners on July 11th and 12th, 1944.

After hearing argument of counsel for the parties the Court being of the opinion that no grounds exist for setting aside said report of the Commissioners, and being of the opinion that the defendant is not entitled to interest on the amount awarded by the Commissioners, and the Court being of the further opinion that the defendant is not entitled to the costs which he claims, it is; therefore, ordered and adjudged as follows:

(a) That the motion of the defendant, Bernard B. Bailey, to amend his said grounds of defense in the manner aforesaid be, and the same is hereby denied, and to the action of the Court in denying said motion and disallowing said amendment the defendant by counsel excepted.

(b) That the defendant's claim for interest on the $6500.00 from October 15, 1941, until payment, be and the [fol. 256] same is hereby denied, and to the Court's ruling in this respect the said defendant by counsel excepted.

. . . . . .

(d) That the petitioner shall deposit with the Clerk of this Court, the sum of $8000.00, for the benefit of the defendant, Bernard B. Bailey, the said payment to include any deposit heretofore made with the Clerk of this Court in accordance with law, and the Clerk is directed to pay the said amounts deposited with him in accordance with the

further order of this Court, to which ruling and order of the Court the defendant by counsel excepted.

(e) That the sum of $8000.00 awarded by the Commissioners shall bear interest at the rate of 6% per annum from August 11th, 1944, until paid, to which ruling of the Court defendant by counsel excepted.

(f) That upon the payment of the sums aggregating $8000.00, together with the interest allowed as heretofore set forth, title to the property taken and rights condemned in these proceedings shall vest in the Commonwealth of Virginia in fee-simple, and upon the payment of the said $8000.00 to the Clerk of said Court, he shall receipt for the same, and the said Clerk shall and he is hereby directed to record the said receipt, and to record a copy of this decree and report of the Commissioners in the current deed books and to properly index the same, and the said sum of $8000.00 shall be retained by the Clerk of said Court [fol. 257] subject to the further order of the Court, to which ruling of the Court defendant by counsel excepted.

(g) The stipulation heretofore filed with the commissioners relating to the cleaning of the mill race as it passes through the culvert under the land condemned by the petitioner and to the cleaning of the tail race through the land condemned by the petitioner, which is as follows:

* * * * * * *

shall be considered as a part of the order of this Court.

The defendant, Bernard B. Bailey, having signified his intentions of applying to the Supreme Court of Appeals of Virginia for a writ of error to the said rulings of the Court and to the Rulings of this Court made and entered herein [fol. 258] June 9, 1944, to-wit, that the statutes of the State of Virginia under which the land of the defendant was taken by the plaintiff are not in violation of the Fourteenth Amendment of the Federal Constitution, and that paragraph four of the defendant's grounds of defense filed herein on April 22, 1944, which claimed compensation for the use of the land taken by the plaintiff for the highway is not a valid claim, and that said paragraph be stricken from the defendant's grounds of defense, to all of which rulings made and entered herein on June 9, 1944, the defendant duly excepted, it is, therefore, further ordered

and adjudged that the operation of this final judgment is suspended for a period of ninety days from this date, and the defendant is required to enter an appeal bond in the penalty of Five Hundred Dollars ($500.00) conditioned as the law directs, in accordance with the statutes in such cases made and provided.

Enter:

(Signed) Paul E. Brown, Judge.

August 11th, 1944.

[fol. 259] IN CIRCUIT COURT OF FAIRFAX COUNTY

RECEIPT OF CLERK

Fairfax, Virginia,
August 22nd, 1944.

Received of the Commonwealth of Virginia, Department of Highways, the sum of Eight Thousand Eleven and 84/100 Dollars, ($8011.84), by check of the Department of Highways, payable to John M. Whalen, Clerk of Circuit Court of Fairfax County, in full payment of the amount directed by the said Court to be paid by the State Highway Commissioner of Virginia to me as Clerk, by the decree of the Circuit Court of Fairfax County, Virginia, entered on the 11th day of August, 1944, in the Chancery Cause of J. A. Anderson, State Highway Commissioner of Virginia, Petitioner, versus Bernard B. Bailey, et al., Defendants, No. 6046, pending in said Court, this being the same payment covered by official receipt F4 #7187 dated August 19, 1944, this additional receipt being issued in obedience to the provisions of said decree requiring that said receipt be recorded, along with a copy of said decree and the report of the commissioners in said suit, in the Current Deed Book of this County.

John M. Whalen, Clerk, by (Signed) Thomas P. Chapman, Jr., Deputy Clerk.

Recorded in Liber 434, page 455, of the Land Records of Fairfax County, Virginia, and indexed and Ex.

[fol. 260] IN CIRCUIT COURT OF FAIRFAX COUNTY

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed October 9, 1944

* * * * * * * *

It is hereby stipulated that upon the application for a writ of error being made in behalf of the defendants, Bernard B. Bailey and Eunice R. Bailey to the Supreme Court of Appeals of Virginia, the record shall consist of the following:

1. All pleadings filed herein.

2. All evidence taken before the presiding Judge and the Commissioners.

3. All orders of Court entered herein.

4. All exhibits introduced in the hearing, the originals to be certified to the Appellate Court without the necessity of copying the same in the record.

5. The complete record in the case of Bernard B. Bailey vs. J. A. Anderson, State Highway Commissioner of Virginia, as the same is shown in the printed record in the Supreme Court of Appeals of Virginia, record number 2708; it being understood that the printed record itself shall be used upon this appeal without the necessity of identification by the Trial Court or the Clerk thereof.

6. Photostatic copies of the three deeds offered in evidence by the Petitioner and referred to on Page 25 of the record, the originals to be certified to the Appellate Court without the necessity of copying the same in the record.

[fols. 261-267] 7. This stipulation.

(Signed) John W. Rust, Attorney for State Highway Commissioner of Virginia. Frank L. Ball, Attorney for Bernard B. Bailey and Eunice R. Bailey.

[fol. 268] IN THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

BERNARD B. BAILEY, Plaintiff in Error

versus

J. A. ANDERSON, State Highway Commissioner of Virginia, Defendant in Error

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Bernard B. Bailey, respectfully shows that he is aggrieved by a final judgment entered by the Circuit Court of Fairfax County, Virginia, on August 11, 1944, in a certain condemnation proceeding instituted by defendant in error against plaintiff in error, et al. A transcript of the record is presented herewith. Your petitioner has duly executed appeal bond in the sum of $500.00, as directed by the Trial Court.

ASSIGNMENTS OF ERROR

Your petitioner assigns error on the part of the Trial Court in the following particulars, to wit:

1. In denying interest, from the time of entry on the property of plaintiff in error, on the amount awarded by the commissioners as damages, the Court allowed the taking of the property without just compensation in violation of Section 6 of the Virginia Constitution, and deprived plaintiff in error of his property without due process of law contrary to the due process clause of the Fourteenth Amend-
[fols. 269-278] ment of the Federal Constitution.

2. The Court erred in holding that the statute under which the property was taken (Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j (6)) is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.

3. In denying compensation for the use of the property, the use being based upon said statute, the Court deprived plaintiff in error of his property without due process of

law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution.

4. The Court erred in denying to plaintiff in error reimbursement for the amount paid to the court reporter for his attendance and services at the hearing.

* * * * * * *

[fol. 279] QUESTIONS INVOLVED

1. Where, under the power of eminent domain, land is taken and disfigured before instituting condemnation proceedings, does Section 6 of the Virginia Constitution, and does the due process clause of the Fourteenth Amendment of the Federal Constitution, require that interest be allowed, from the date of taking, on the amount awarded in [fol. 280-287] the proceedings as damages resulting to the adjacent or other property of the owner?

2. In the light of the statutory requirement that the Court shall direct the commissioners in condemnation proceedings "to view the land", and in the light of the rule that compensation for land taken for highway construction is based upon the value before the taking and the rule that the damages resulting to the adjacent or other property of the owner from the construction are measured by taking the difference between the value before the taking and the value after the completion of the construction, does the statute in question (Acts 1940, ch. 380, p. 666, Sections 4 and 6; Michie's Code, Sections 1969j(4) and 1969j(6)) deprive the owner of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution in providing that the defendant in error may enter upon and take possession of the property and proceed with the construction and, within sixty days after the completion of the construction, shall institute condemnation proceedings, with the further provision that it is the intention of the statute to provide that the property "may, in the discretion of the Commissioner, be condemned after the construction of the highway, as well as prior thereto?"

3. If the statute in question, which constituted the sole authority for taking and using the property, is unconstitutional, as contended, did the Trial Court deprive the plaintiff in error of his property without due process of law,

contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution, by denying his claim for compensation for the use of the property.

* * * * * * *

[fol. 288] CONCLUSION

The petitioner, therefore, respectfully prays that he may be awarded a writ of error; that this Honorable Court may review the actions of the Trial Court; that the said judgment of August 11, 1944, may be modified so as to allow interest on $6,500.00, the amount awarded as damages, as claimed; that the statute in question (Acts 1940, ch. 380, p. 666, Sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6)) be declared to be in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States; that the plaintiff in error may be awarded compensation for the use of his property from October 15, 1941, until he is divested of title; and that this cause be remanded for further proceedings to determine the reasonable value of the use of the property; and finally that the plaintiff in error may be reimbursed for the amount paid to the court reporter as claimed.

Copy of this petition was delivered to John W. Rust, Esquire, attorney for the defendant in error, on the 19th day of October, 1944.

Counsel for petitioner adopts this petition as his opening brief.

(S.) Bernard B. Bailey, Frank L. Ball, Attorneys for Petitioner.

Received; October 21, 1944.

M. B. Watts, Clerk.

* * * * * * *

[fols. 289-291] IN SUPREME COURT OF APPEALS OF VIRGINIA

ORDER REFUSING WRIT OF ERROR—November 22, 1944

* * * * * * *

The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemna-

tion proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and the said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

[fol. 292] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—February 15, 1945

Bernard B. Bailey, the appellant herein, considering himself aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, entered on November 22, 1944, in the above entitled cause, presents this petition for appeal therefrom within three months thereafter and respectfully shows that the case is one in which, under the legislation in force when the Act of January 31, 1928 (28 U. S. C. A. 861a) was passed, a review could be had in the Supreme Court of the United States on writ of error.

The final judgment from which appeal is sought was rendered in a suit in the highest Court of Virginia in which a decision could be had, in which there was drawn in question the validity of a Virginia statute on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. The suit was instituted on June 17, 1943, in the Circuit Court of Fairfax County, Virginia, by the State Highway Commissioner of Virginia for the purpose of condemning for highway purposes certain real property of the defendant, the appellant herein, the petition being filed one year and eight months after the State Highway Commissioner deposited with the Clerk the sum of $1,500 and seized the property. The defendant filed an answer setting up his claim for compensation and damages, with interest thereon from the time of [fol. 293] the seizure until payment. The defendant set up also a claim for compensation for the use of the property for highway purposes, dating from the time of seizure, on

the ground that the use was unauthorized because it was based entirely on Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6), which was expressly assailed as being repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it allows the State Highway Commissioner to enter and construct the highway and mutilate and disfigure the property, and prevents the owner from having his property viewed by commissioners before the mutilation and disfigurement are completed, and the defendant alleged that to deny him compensation for the unauthorized use would deprive him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The Circuit Court of Fairfax County expressly held that the statute assailed is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, and ordered that the claim for compensation for the use of the property under the statute be stricken from the answer. The commissioners appointed by the Circuit Court, pursuant to the requirement of Section 1969j(2) of the Virginia Code, viewed the property, heard the testimony, and awarded $1,500 as compensation for the property taken and $6,500 as damages to the residue. The claim for interest was not presented to the commissioners. After the award was made by the commissioners the defendant, withdrawing his claim for interest on the amount awarded as compensation for the property taken, presented to the Circuit Court his claim for interest on the $6,500 awarded as damages to the residue of his property from October 15, 1941, when the property was seized, until pay-
[fol. 294] ment is made, which claim was denied by the Circuit Court.

Final judgment of the Circuit Court was entered on August 11, 1944. The judgment was suspended pending petition for writ of error to the Supreme Court of Appeals of Virginia to review the said rulings of the Circuit Court denying the claim that the statute assailed is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States and denying the claims for compensation for the use of the property and for interest on the damages awarded.

On petition to the Supreme Court of Appeals of Virginia for a writ of error, in which said claims were reiterated, and in which the further claim was made that in denying interest on the amount awarded as damages the Circuit Court deprived the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of Appeals of Virginia, by order entered on November 22, 1944, expressly affirmed the judgment of the Circuit Court, the decision of the Supreme Court of Appeals of Virginia being in favor of the validity of the statute assailed and against the claims for compensation for the use of the property taken and for interest on the damages awarded, the other reading as follows:

> "The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemnation proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

Jurisdiction of the Supreme Court of the United States on appeal is therefore invoked under Section 237(a) of the Judicial Code (28 U. S. C. A., section 344(a)), as amended.

[fol. 295] ASSIGNMENT OF ERRORS

The petitioner, Bernard B. Bailey, assigns the following errors in the record and proceedings in the Supreme Court of Appeals of Virginia in the above entitled cause:

1. The Supreme Court of Appeals of Virginia erred in holding that the statute assailed, being Acts 1940, c. 380, p. 666, sections 4 and 6, Virginia Code Supp. 1940, now Virginia Code 1942, sections 1969j(4) and 1969j(6), under which the appellant's property was seized, mutilated, and used by the appellee for highway purposes, is not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, in that the

statute assailed, by vesting in the appellee the power to enter upon and mutilate property and, while mutilating it, to control the time for instituting condemnation proceedings to determine the amount of compensation and damages to be paid, enables the appellee to manipulate a procedural phase of the condemnation, in a manner detrimental to the owner, by holding off the appointment of commissioners to view the property until the appellee has mutilated and disfigured it to such extent that when, in the exercise of the discretion conferred by the statute assailed, the appellee permits the commissioners to view the property they can not visualize the condition thereof as it was immediately before the seizure, the result being to render it exceedingly difficult, if not impossible, for the owner to establish the just compensation for the property taken and the damages to the residue, inasmuch as the Virginia law in condemnation cases is that the viewing of the property by the commissioners is the important and controlling factor in the determination of compensation and damages outweighing the evidence adduced at the hearing held after the view has been made, and that the compensation is determined by ascertaining the value of the property taken immediately [fol. 296] before the seizure, and the damages are determined by ascertaining the difference between the value of the residue immediately before the seizure and the value thereof immediately after completion of the highway construction; and in that the unconstitutional power and control bestowed by the statute was deliberately and oppressively imposed by the appellee upon the appellant to his detriment and damage.

2. The Supreme Court of Appeals of Virginia erred in denying to the appellant compensation for the use of his property taken for the highway, in that the use is unauthorized inasmuch as it is based entirely upon the unconstitutional statute assailed, and compensation for the unauthorized use of the property is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Appeals of Virginia erred in denying to the appellant interest on the amount awarded as damages to the residue of the appellant's property from

the time of the commencement of the mutilation of the property by the appellee until the appellant receives payment, in that interest on the damages awarded is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the appellant prays:

1. That the decision and judgment of the Supreme Court of Appeals of Virginia in the above entitled cause be reversed.

[fol. 297] 2. That the statute assailed be declared unconstitutional, as being repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

3. That the appellant's claims (a) for compensation for the use which the appellee has made and continues to make of the appellant's property under the statute assailed, and (b) for interest at the lawful rate on the amount awarded as damages to the residue of the appellant's property, from the date of the commencement of the mutilation until the date of payment, be recognized and upheld as valid and enforceable claims.

4. That a judgment be rendered in favor of appellant for his costs.

5. That the Clerk of the Supreme Court of Appeals of Virginia be directed to prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within a time to be fixed as required by law.

Appellant herewith tenders cost bond in such sum as the Court may require. Presented herewith is the cost bond, in the sum of $500.00, that was tendered to the Honorable Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia, who, on February 12, 1945, refused the appeal because he was of the opinion that the petition should be presented to a Justice of the Supreme Court of the United States. The sureties on the bond are those who

have acted as sureties on the bonds filed and approved for appeal to the Supreme Court of Appeals of Virginia in Bailey v. Anderson, 182 Va. 70, and for appeal to the same Court in the condemnation proceeding, which is the subject of the present appeal, and the amount of the bond is the same. Attached to the bond is the affidavit of the sureties to the effect that their equity in real estate in Arlington County, Virginia, is in excess of $500.00.

This the 15th day of February, 1945.

Bernard B. Bailey.

[fols. 298-326] In Supreme Court of Appeals of Virginia

Re: Bernard B. Bailey v. J. A. Anderson, State Highway Commissioner of Virginia

Order Refusing Petition for Appeal—February 12, 1945

The appeal presented in the case of Bernard B. Bailey v. J. A. Anderson, State Highway Commissioner of Virginia, is hereby refused by me this 12th day of February, 1945, as I am of the opinion that the petition should be presented to a Justice of the Supreme Court of the United States.

Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia.

[fol. 327] In the Supreme Court of the United States

Bernard B. Bailey, Appellant,

vs.

J. A. Anderson, State Highway Commissioner of Virginia, Appellee

Order Allowing Appeal—February 15, 1945

Bernard B. Bailey, appellant, having prayed for the allowance of an appeal in the above entitled cause to the Supreme Court of the United States from the judgment made and entered therein by the Supreme Court of Appeals of Virginia, on the 22nd day of November 1944, and from each and every part thereof, affirming a judgment entered

by the Circuit Court of Fairfax County, Virginia, on the 11th day of August, 1944, and having presented and filed his Petition for Appeal, Assignment of Errors, and Prayer for Reversal, and Jurisdictional Statement, pursuant to the statutes of the United States and the Revised Rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of Appeals of Virginia in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of Appeals of Virginia shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same, together with all papers filed, in accordance with the Revised Rules of the Supreme Court of the United States, to the Supreme Court of the United States, so that he shall have the same in said Court within not exceeding forty days from this date and from the date of signing the citation.

Appellant having tendered and filed a cost bond with good [fols. 328-330] and sufficient security conditioned as required by law in such cases made and provided, and in the sum of $500.00, said bond is accordingly approved.

Dated this 15th day of February, 1945.

Harlan F. Stone.

[fol. 331] *Citation in usual form showing service on J. A. Anderson omitted in printing.*

[fols. 332-333] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Honorable M. B. Watts, Clerk of the Supreme Court of Appeals of Virginia:

Appellant in the above entitled cause hereby indicates the portions of the record to be incorporated in the transcript thereof, as follows:

Petition to condemn land filed on June 17, 1943, by J. A. Anderson, State Highway Commissioner of Virginia, against Bernard B. Bailey, et al.

Pleading of Bernard B. Bailey, filed on July 9, 1943.

Pleading of Bernard B. Bailey, filed on March 16, 1944.

Order of April 6, 1944, denying motion for stay.

Answer of Bernard B. Bailey, filed April 22, 1944.

Motion to strike, filed by J. A. Anderson, State Highway Commissioner of Virginia, on May 12, 1944.

Order appointing commissioners, entered on June 9, 1944.

Oath of commissioners, filed on July 11, 1944.

Transcript of evidence on behalf of the plaintiff and defendant at the hearing on July 11 and July 12, 1944.

Report of commissioners, filed on July 12, 1944.

Stipulation of plaintiff and defendant as to operation of mill, filed on July 12, 1944.

Exceptions to report of commissioners, filed on July 18, 1944, by Bernard B. Bailey.

Exceptions to report of commissioners, filed on July 20, 1944, by J. A. Anderson, State Highway Commissioner of Virginia.

Decree of Circuit Court of Fairfax County, entered on August 11, 1944.

Receipt of Clerk of Circuit Court of Fairfax County, filed [fol. 334] on August 22, 1944, acknowledging deposit of $8,011.84 by Commonwealth of Virginia, Department of Highways.

Stipulation, filed on October 9, 1944, as to transcript of record in application to Supreme Court of Appeals of Virginia for writ of error.

Certificate of Clerk of Circuit Court of Fairfax County, dated October 19, 1944.

Petition for writ of error filed on October 21, 1944, by Bernard B. Bailey in Supreme Court of Appeals of Virginia.

Order of Supreme Court of Appeals of Virginia entered on November 22, 1944.

Petition of Bernard B. Bailey for appeal to the Supreme Court of the United States, Assignment of Errors, and Prayer for Reversal, dated February 15, 1945.

Jurisdictional Statement of Bernard B. Bailey, and attached Statement of the Honorable Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia, refusing appeal on February 12, 1945.

Order allowing Appeal, dated February 15, 1945, signed by the Honorable Harlan F. Stone, Chief Justice of the United States.

Cost Bond in the sum of $500.00, approved by the Honorable Harlan F. Stone, Chief Justice of the United States, and affidavit of sureties attached.

Citation, dated February 15, 1945, signed by the Honorable Harlan F. Stone, Chief Justice of the United States; bearing proof of service on February 21, 1945.

Proof of service of appeal papers, dated February 21, 1945.

Copy of this praecipe, dated February 21, 1945.

Bernard B. Bailey.

This February 21, 1945.

[fol. 335] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed April 10, 1945

The appellant adopts his assignment of errors as the statement of the points on which he intends to rely, and designates the following parts of the record, as filed, which he thinks are necessary for the consideration thereof, to wit:

Record from Circuit Court of Fairfax County

Parts of petition for condemnation filed June 17, 1943, as follows: page 2, second paragraph, beginning "Your petitioner"; page 5, paragraph 11; page 6, paragraph 12; pages 7 and 8, paragraph 14; page 8, first seven lines of paragraph 15, and first six words of eighth line of paragraph 15.

Statement filed July 9, 1943, omitting oath, page 10.

Statement filed March 16, 1944, omitting oath, pages 12 and 13.

Order entered April 6, 1944, page 15.

Parts of answer filed April 22, 1944, as follows: pages 16, 17, 18, 19 and 20; page 24, first two lines; page 25, first seven lines of paragraph 18.

Parts of motion to strike filed May 12, 1944, as follows: pages 27, 28 and 29; page 30, first four lines on the page and all of paragraphs 9 and 10; page 32, first sentence of paragraph 15; page 33, paragraph 16.

[fol. 336] Order entered June 9, 1944, omitting last paragraph and the signatures of attorneys, pages 34 to 36.

Oath of commissioners filed July 11, 1944, page 37.

Parts of the report of the evidence, as follows: pages 39 and 40.

Parts of testimony of T. W. Ross, as follows: page 127, the name "T. W. Ross" at bottom of page; pages 128, 129 and 130; page 131, first eight lines; page 138, all except first nine lines; pages 139 and 140; page 141, first thirteen lines; page 150, all except style of case; page 151, page 152, first six lines.

Parts of testimony of W. Frank Smith, as follows: page 152; page 153, first eleven lines; page 160, all except first four lines; page 161, first ten lines; page 163, all except first seven lines.

Parts of testimony of Bernard B. Bailey, as follows: page 168, first three lines; page 177, two questions and answers, beginning "Mr. Bailey you were estimating" and ending after "Yes sir"; page 186, last eight lines; page 187, first two lines; page 188, all except first fifteen lines and except the last line; page 193, last two lines; page 194, all except last seven lines; page 209, all except first seven lines; page 210; page 211, first eleven lines; page 231, all except first ten lines; page 232, first three lines.

Report of commissioners filed July 12, 1944, pages 243 and 244.

Parts of final judgment entered August 11, 1944, as follows: page 252; page 253, all except last nine lines; page 254, last six lines; page 255; page 256, all except paragraph (c); page 257, all except part quoted; page 258, all except signatures of attorneys.

Clerk's receipt August 22, 1944, page 259.

Stipulation October 9, 1944, pages 260 and 261.

[fol. 337] Record from Supreme Court of Appeals of Virginia

Parts of petition for writ of error, filed October 21, 1944, as follows: page 268; page 269, first fourteen lines; page 279, last six lines; page 280; page 288, all except certificate of attorneys at bottom of page.

Order entered November 22, 1944, page 289.

Appeal papers in Supreme Court of the United States

Petition for appeal, assignment of errors, and prayer for reversal, pages 292 to 297.

Statement of the Chief Justice of the Supreme Court of Appeals of Virginia refusing appeal, dated February 12, 1945, page 326.

Order allowing appeal, signed by the Chief Justice of the United States, dated February 15, 1945, pages 327 and 328.

Citation dated February 15, 1945, and proof of service on February 21, 1945, page 331.

Praecipe dated February 21, 1945, pages 333 and 334.

This statement of points and designation.

Dated April 5, 1945.

Bernard B. Bailey.

Service of the foregoing statement of the points to be relied upon and designation of the parts of the record the appellant thinks necessary for the consideration thereof is hereby accepted, and the receipt of a copy thereof is hereby acknowledged for and on behalf of the appellee this the 9th day of April, 1945.

J. A. Anderson, State Highway Commissioner of Virginia, by Abram R. Staples, his Attorney and Counsel.

[fol. 337½] [File endorsement omitted.]

[fol. 338] In the Supreme Court of the United States

* * * * * * * *

Designation of Appellee of Additional Parts of Record to Be Printed—Filed April 12, 1945

The appellee, J. A. Anderson, State Highway Commissioner of Virginia, designates the following additional

parts of the record as filed which he thinks are necessary for the consideration of appellant's assignments of error, to-wit:

Record from Circuit Court of Fairfax County.

Page 176—first fourteen lines.

[fol. 339] Page 187—in addition to designation of appellant, the balance of said page except the last five lines.

Page 193—balance of the page, beginning with the first question, line 8.

Page 232—in addition to appellant's designation remaining portion of this page.

Page 233—all of this page.

Page 234—first two lines.

Page 246—exceptions of appellant.

Pages 247, 248, 249, 250, and 251—exceptions of appellee.

Dated April 9, 1945.

J. A. Anderson, State Highway Commissioner of Virginia, Appellee, by Abram S. Staples, Attorney General of Virginia and Counsel for Appellee.

Service of the foregoing statement of designation of additional parts of the record the appellee thinks necessary for the consideration of the assignments of error relied on by the appellant is hereby accepted, and the receipt of a copy thereof is hereby acknowledged for and on behalf of the appellant this 10th day of April, 1945.

Bernard B. Bailey.

[fol. 339½] [File endorsement omitted.]

[fol. 340] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—April 30, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits, and the case is transferred to the summary docket. The Court desires to hear oral argument only upon the questions whether this

Court has jurisdiction of the case, and whether appellant was denied interest upon his condemnation award in violation of the Fourteenth Amendment.

Endorsed on cover: File No. 49,534. Virginia, Supreme Court of Appeals. Term No. 49. Bernard B. Bailey, Appellant, vs. J. A. Anderson, State Highway Commissioner of Virginia. Filed March 26, 1945. Term No. 49, O. T., 1945.

FILE COPY

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FILED
MAR 26 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 49

BERNARD B. BAILEY,

Appellant

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

BERNARD B. BAILEY,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1081

BERNARD B. BAILEY,

Appellant

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

JURISDICTIONAL STATEMENT

The petitioner, Bernard B. Bailey, respectfully presents herein a statement particularly disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Appeals of Virginia, entered on the 22nd day of November, 1944, in the above entitled cause.

Statutory Provisions Believed to Sustain Jurisdiction of the Supreme Court of the United States

The statutory provisions believed to sustain jurisdiction of the Supreme Court of the United States are as follows:

Sec. 237(a) of the Judicial Code, as amended by Act of Feb. 13, 1925, c. 229; 43 Stat. 937; U. S. C. A. Tit. 28, Sec. 344(a);

Act approved Feb. 13, 1925, c. 229, Sec. 8(a); 43 Stat. 940; U. S. C. A. Tit. 28, Sec. 350;
Act approved January 31, 1928, c. 14; 45 Stat. 54; U. S. C. A. Tit. 28, Sec. 861a; as amended by Act of Apr. 26, 1928, c. 440; 45 Stat. 466; U. S. A. Tit. 28, Sec. 861b.

Statute of Virginia, the Validity of Which Is Involved

Virginia Acts 1922, c. 403, sec. 10, last paragraph, as amended by Acts 1940, c. 380, sections 4 and 6; Virginia Code 1942, sections 1969j(4), 1969j(6).

Section 1969j(4), Virginia Code 1942, provides as follows:

"In addition to the exercise of the power of eminent domain, as provided hereinabove, the commissioner is hereby authorized to enter upon and take possession of such property and rights of way, for the purposes set out in section 1969j(1), as the commissioner may deem necessary, and proceed with the construction of such highway. Within sixty days after the completion of the construction of such highway, if the commissioner and the owner or owners of such lands are unable to agree as to compensation and damages, if any, caused thereby, the said commissioner shall institute condemnation proceedings, as hereinbefore provided; and the amount of such compensation and damages, if any, awarded to the owner in such proceedings shall be paid out of the State highway fund, the said commissioner to pay to the landowner or into court, or to the clerk thereof, for his benefit such sum as he shall estimate to be the fair value of the land taken and damage done, before entering upon such land for construction purposes, provided such payment shall in no wise limit the amount to be allowed under proper proceedings. It is the intention of this section to provide that such property and rights of way may, in the discretion of the commissioner, be condemned after the construction of the highway, as well as prior thereto, and to direct the fund out of which the judgment of the court in condemnation proceedings shall be paid, and to provide that in all

other respects the provisions of this act shall apply, whether the property and rights of way are condemned before or after the construction of the highway, but the authorities constructing such highway under the authority of this section, shall use diligence to protect growing crops, pastures, and to prevent damage to any property not taken. So far as possible, all rights of way shall be acquired or contracted for, before any condemnation is resorted to."

Sec. 1969j(6), Virginia Code 1942, provides as follows:

"A certificate issued by the State Highway Commissioner and counter-signed by the Treasurer of Virginia, stating that any sum or sums of money designated therein will be paid pursuant to the order of any court or courts wherein the condemnation proceedings under the provisions of this act are pending, when filed with the said court or courts, shall be deemed and held for the purpose of this act to be payment into the custody of such court or courts. Payment against any such certificate so issued and countersigned, when ordered by the court or courts named therein, shall be paid by the Treasurer on warrants of the Comptroller, issued on vouchers signed by the State Highway Commissioner. A duplicate of each such certificate so issued and countersigned shall be kept as a record in the office of the State Highway Commissioner and a copy thereof shall be filed with the Treasurer of Virginia."

Date of Judgment of Supreme Court of Appeals of Virginia, and of Application for Appeal to the Supreme Court of the United States

Application for appeal is duly made within the period of three months after the entry of judgment, as required by 28 U. S. C. A., Section 350, in that the judgment of the Supreme Court of Appeals of Virginia sought to be reviewed was entered on November 22, 1944, and the petition for appeal was presented to and refused by the Honorable

Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia on February 12, 1945, as evidenced by his statement attached.

Nature of Case, and Rulings of the State Trial and Appellate Courts, and Cases Sustaining Jurisdiction of the Supreme Court of the United States

The petitioner presents below the nature of the case and the rulings of the Court, in order to show that they were such as to bring the case within the jurisdictional provisions relied on, citing the cases believed to sustain jurisdiction, and specifying the stage in the proceedings in the court of first instance and in the appellate court at which, and the manner in which the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the court, with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on the Supreme Court of the United States:

Validity of statute drawn in question, and decision in favor of validity. In condemnation proceedings instituted on June 17, 1943, in the Circuit Court of Fairfax County, Virginia, by the State Highway Commissioner of Virginia, an answer was filed on April 22, 1944, by the property owner, the petitioner herein, alleging in paragraph 5 thereof that the State Highway Commissioner, acting under the authority contained in said Sections 1969j(4) and 1969j(6), on October 15, 1941, "seized the land described in the petition and since that time has constructed a state highway thereon and has used the same for the travel of the public, which use is now being made of the land * * * that said

statute is in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States because it allows the petitioner to enter and construct the highway and mutilate and disfigure the property for highway purposes and at the same time restrains the owner from acting upon his own motion and from compelling the petitioner to act to have commissioners appointed to view the land before the mutilation and disfigurement are completed." It was expressly claimed in paragraph 6 of said answer that the owner, the petitioner herein, had been damaged by the operation of the unconstitutional feature of said statute and had the right to challenge its validity, in that from October 15, 1941, until June 17, 1943, he was restrained by said statute from applying to the court and from compelling the State Highway Commissioner to apply to the court for the appointment of commissioners, pursuant to the statute regulating the method of determining just compensation, "to go on the property and view the entire property, including the part taken and the residue, to determine the value of the entire property in its condition before it was mutilated and disfigured beyond recognition;" that during that period of time the State Highway Commissioner "so changed and disfigured the property, as hereinafter set forth in detail, as to make it impossible, when the petition was filed herein and at the present time, for commissioners appointed by the court pursuant to the statute regulating the method of determining just compensation, to go on the property and determine the value of the entire property as it existed before the petitioner changed and disfigured it; and since the damages to the residue of the property resulting from the highway construction is the difference between the fair market value of the property at the time the entry was made and the fair market value of the property after the construction of the highway it is impossible now and was impossible on

June 17, 1943, when the petition herein was filed, to obtain a fair and just appraisal of the damages to which the defendant is entitled." The answer then set forth in detail, in paragraphs 7 and 8, the nature and extent of the mutilation and disfigurement of the property, alleging in substance that before the mutilation the property contained grounds appropriate for the colonial character of the dwelling thereon, and a distinctive hill site appropriate for the erection of another dwelling, and that by immense excavations and fills the State Highway Commissioner completely wiped out these grounds and the hill site. It was alleged in paragraph 9 of said answer that "Because of this mutilation and disfigurement of the property, it is now impossible for commissioners appointed by the court to go on the property and visualize the condition and value of the property before the disfigurement. An inspection of the property in its present condition gives a false impression of the condition and value of it before the disfigurement and leads the viewer to believe that the property was much less valuable than it actually was. As a result, the defendant is unable to obtain adequate damages representing the difference between the value of the property before and the value after the disfigurement." On motion filed by the State Highway Commissioner to strike the answer, the Circuit Court, in an order appointing commissioners entered on June 9, 1944, expressly held that the statute assailed is not in violation of the due process clause of the Fourteenth Amendment, the language of the Court being as follows: "And the Court is of the further opinion that the Statutes of the State of Virginia, under which this proceeding was instituted and the land of the Defendant was taken are not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, and the Court so holds, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts." In the final judgment of the Circuit

Court entered on August 11, 1944, it is recited that the defendant, Bernard B. Bailey, signified his intention of applying to the Supreme Court of Appeals of Virginia for a writ of error to the ruling of the Court made and entered on June 9, 1944, "that the statutes of the State of Virginia under which the land of the defendant was taken by the plaintiff are not in violation of the Fourteenth Amendment of the Federal Constitution," and the judgment was suspended for ninety days conditioned upon appeal bond being filed. After filing proper appeal bond, the defendant, Bernard B. Bailey, duly applied to the Supreme Court of Appeals of Virginia for a writ of error to review the judgment of the Circuit Court, one of the errors assigned being that the Circuit Court erred "in holding that the statute under which the property was taken (Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6) is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution." On November 22, 1944, an order was entered in the Supreme Court of Appeals of Virginia, reading as follows:

> "The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemnation proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

No opinion was delivered by the Supreme Court of Appeals of Virginia, but it is plain that in affirming the judgment of the Circuit Court the decision of the Supreme

Court of Appeals was in favor of the validity of the statute in question.[1] Thus, there was drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

Judgment sought to be reviewed rendered by highest Court in Virginia in which decision could be had. The Supreme Court of Appeals is the highest Court in Virginia, and, while the Court rejected the petition for writ of error and refused the writ, the Court expressly affirmed the judgment of the Circuit Court. The judgment of the Supreme Court of Appeals is, therefore, the judgment of the highest Court of Virginia in which a decision in the suit could be had.[2]

Finality of judgment sought to be reviewed. The adjudication by the Supreme Court of Appeals of Virginia was final in its nature because if there should be an affirmance by the Supreme Court of the United States the Circuit Court of Fairfax County, Virginia, would have nothing to do but to execute the judgment it had already rendered.[3]

Claim for compensation for use of property, and ruling thereon. In paragraph 4 of said answer, filed in the condemnation proceedings in the Circuit Court of Fairfax County, Virginia, claim was made for "compensation for the use of the land described in the petition for highway purposes at the rate of $200.00 per month for each and every month the land has been and will be used for highway purposes from October 15, 1941, when the land was seized, until

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[1] Bragg v. Weaver, 251 U. S. 57, 58, 64 L. Ed. 135, 40 S. Ct. 62; Royster Guano Co. v. Virginia, 253 U. S. 412, 413, 64 L. Ed. 989, 40 S. Ct. 560.

[2] Norfolk and S. Turnpike Co. v. Virginia, 225 U. S. 264, 56 L. Ed. 1082, 32 S. Ct. 823; Royster Guano Co. v. Virginia, supra.

[3] Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73, 1 S. Ct. 15; Mower v. Fletcher, 114, U. S. 127, 29 L. Ed. 117, 5 S. Ct. 799; Clark v. Kansas City, 172 U. S. 334, 43 L. Ed. 467, 19 S. Ct. 207; Georgia Ry. & Power Co. v. Decatur, 262 U. S. 432, 67 L. Ed. 1065, 43 S. Ct. 613.

such date as the petitioner is enjoined from using the land prior to acquiring title thereto in a legal manner." The basis for this claim, set forth in paragraphs 5, 6, 7, 8, and 9 of said answer, is that the use of the property is without constitutional authority because it is based upon the said statute the validity of which was drawn in question. In paragraph 10 of said answer the defendant alleged "that to deny him compensation for the use already made of his property for highway purposes and to allow the petitioner to continue to use the property for such purposes before acquiring title thereto, which use is based entirely upon said unconstitutional statute, would operate to deprive the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States." On said motion filed by the State Highway Commissioner to strike the answer, the Circuit Court, in said order appointing commissioners entered on June 9, 1944, made the following ruling, viz., "And the Court also being of the opinion that Paragraph No. 4 of the pleadings of Bernard B. Bailey which claims compensation for the use of the land in the sum of $200.00 per month is not a valid claim, and the Court doth order that this paragraph be stricken from the pleading of the said Bernard B. Bailey, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts." In said final judgment of the Circuit Court entered on August 11, 1944, it is recited that the defendant, Bernard B. Bailey, signified his intention of applying to the Supreme Court of Appeals of Virginia for a writ of error to the ruling of the Court made and entered on June 9, 1944, "that paragraph four of the defendant's grounds of defense filed herein on April 22, 1944, which claimed compensation for the use of the land taken by the plaintiff for the highway is not a valid claim, and that said paragraph be stricken from the defendant's grounds of defense", and as heretofore stated

said judgment was suspended for ninety days conditioned upon appeal bond being filed, and after filing proper appeal bond, the defendant, Bernard B. Bailey, duly applied to the Supreme Court of Appeals of Virginia for a writ of error to review the judgment of the Circuit Court, one of the errors assigned being that the Circuit Court erred in denying said compensation for the use of the property, the assignment of error being in the following language, viz., "In denying compensation for the use of the property, the use being based upon said statute, the Court deprived plaintiff in error of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution." The Supreme Court of Appeals, by the aforementioned order entered on November 22, 1944, affirmed the judgment of the Circuit Court and thereby denied the claim for compensation for use of the property. Thus, a right under the Constitution of the United States to compensation for use of the property was expressly set up, the claim was denied, and, for the reasons hereinbefore stated the judgment of the Supreme Court of Appeals, denying the claim, was a final judgment by the highest Court in Virginia in which a decision could be had. The question of compensation for use of the property by a State authority is complementary to and inseparable from the question concerning the constitutionality of the statute assailed, since the contention is that the use is unauthorized because it is based upon the statute; and inasmuch as the statute was assailed as being repugnant to the Fourteenth Amendment it is believed that Section 237(a) of the Judicial Code, as amended, sustains jurisdiction upon appeal to review not only the ruling

sustaining the statute but also the ruling denying compensation for the use of the property.[4]

Claim for interest on damages awarded, and ruling thereon. In paragraph 3 of said answer filed in the condemnation proceedings in the Circuit Court of Fairfax County, the defendant, Bernard B. Bailey, claimed "interest at the lawful rate on the total amount awarded as compensation and damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made." In paragraph 4 of said motion to strike the answer, the State Highway Commissioner impliedly admitted that interest should be allowed from October 15, 1941, when the land was seized, until June 17, 1943 when the condemnation proceedings were instituted, but contended that no interest should be allowed during the period after June 17, 1943, in which the owner was "insisting that the condemnation proceedings be delayed until the termination of the injunction suit".[5] The claim for interest was not submitted to the commissioners. After the award by the commissioners of compensation and damages, the claim for interest was presented to the Circuit Court, as shown by the recital in the final judgment, reading as follows: "Whereupon, the defendant stated to the Court that no claim was being made for interest on the One Thousand Five Hundred Dollars ($1500.00), being the amount awarded in said report as compensation for the value of the land taken for the highway, and, in order to evidence that fact, the defendant moved the Court for permission to amend paragraph three of the defendant's grounds of defense, filed herein on April 22nd, 1944, so that said paragraph

[4] Prudential Insurance Co. of America v. Cheek, 259 U. S. 530, 547, 66 L. Ed. 1044, 42 S. Ct. 516; Fox River Paper Co. v. R. R. Com. of Wisconsin, 274 U. S. 651, 653, 71 L. Ed. 1279, 47 S. Ct. 669; Flourney v. Weiner, 321 U. S. 253, 754, 88 L. Ed. 478, 699.

[5] Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914.

would read as follows: 'The defendant claims interest at the lawful rate on the amount awarded as damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made.'" The judgment then recited that "After hearing argument of counsel for the parties the Court * * * being of the opinion that the defendant is not entitled to interest on the amount awarded by the Commissioners * * * it is, therefore, ordered and adjudged * * * (a) That the motion of the defendant, Bernard B. Bailey to amend his said grounds of defense in the manner aforesaid be, and the same is hereby denied, and to the action of the Court in denying said motion and disallowing said amendment the defendant by counsel excepted. (b) That the defendant's claim for interest on the $6500.00 from October 15, 1941, until payment, be and the same is hereby denied and to the Court's ruling in this respect the said defendant by counsel excepted." The final judgment ordered the State Highway Commissioner to deposit with the Clerk for the owner's benefit the sum of $8,000.00, being the total amount of the award for compensation and damages, and that this sum be paid by the Clerk in accordance with further orders of the Court and to bear interest at six per cent per annum from August 11, 1944, the date upon which judgment was entered, until paid, to which ruling exceptions were duly made. The deposit of $8,000.00 was made on August 19, 1944, pursuant to the order of the Court. In the aforesaid petition for writ of error filed in the Supreme Court of Appeals, one of the errors assigned was as follows: "In denying interest, from the time of entry on the property of plaintiff in error, on the amount awarded by the commissioners as damages, the Court allowed the taking of the property without just compensation in violation of Section 6 of the Virginia Constitution, and deprived plaintiff in error of his property without due process of law contrary to the due process

clause of the Fourteenth Amendment of the Federal Constitution." The Supreme Court of Appeals, by the aforementioned order entered on November 22, 1944, affirmed the judgment of the Circuit Court, and thereby denied the claim for interest on the amount awarded as damages from October 15, 1941, until payment is made. The federal question relating to interest on the amount awarded as damages was timely presented in the petition for writ of error filed in the Supreme Court of Appeals. It was not necessary to set up the federal question until the claim for interest had been denied, as the denial of interest could not have been anticipated.[6] The claim for interest was not denied until the Circuit Court ruled on the claim. Therefore, it was not necessary to set up the federal question until after the Circuit Court had ruled that interest would not be allowed.[7] Moreover, the Supreme Court of Appeals recited in said order that it had given mature consideration to the petition for writ of error, in which the federal question as to interest was expressly set up. Since the Supreme Court of Appeals expressly affirmed the judgment of the Circuit Court, and since the Circuit Court expressly denied the claim for interest, and this ruling was presented to the Supreme Court of Appeals as the basis for the federal question, the Supreme Court of Appeals necessarily held that the denial of interest did not violate the due process clause of the Fourteenth Amendment of the Federal Constitution. Since the Supreme Court of Appeals necessarily ruled on the federal question it is immaterial that the federal question was not raised in the Circuit Court.[8] Thus, a right under the Constitution of the United States to in-

[6] Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.

[7] Johnson v. N. Y. Life Ins. Co., 187 U. S. 491, 495, 47 L. Ed. 273, 23 S. Ct. 194.

[8] Whitfield v. State of Ohio, 297 U. S. 431, 435-436, 80 L. Ed. 778, 56 S. Ct. 532.

terest on the amount awarded as damages was expressly set up, the claim was denied, and, for the reasons hereinbefore stated, the judgment of the Supreme Court of Appeals denying the claim was a final judgment by the highest Court in Virginia in which a decision could be had. While the ruling denying interest on the amount awarded as damages is not related to the question concerning the constitutionality of the statute assailed, it is believed that the ruling denying interest is reviewable on appeal because it is involved in the same cause in which the statute was upheld.[9]

Statement of Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Question concerning the statute assailed. Whether the Fourteenth Amendment prohibits a State from conferring upon a State agency the authority to seize and mutilate private property for a public purpose and to forestall and postpone until the mutilation has been completed the ascertainment by viewers of the market value of the property in its condition at the time of the seizure is a question which, it is believed, has not been decided by the Supreme Court of the United States, and is not foreclosed by principles enunciated in existing decisions. The question requires analysis and exposition for a decision.[10] There is no question concerning the right under a constitutional statute to take and mutilate private property in invitum without first instituting proceedings, even though the statute is silent as to the time or even as to the necessity for instituting pro-

[9] Prudential Ins. Co. of America v. Cheek, 259 U. S. 530, 547, 66 L. Ed. 1044, 42 S. Ct. 516; Flourney v. Weiner, 321 U. S. 253, 754, 88 L. Ed. 478, 699.

[10] Milhelm v. Moffat Tunnel Imp. Dist., 262 U. S. 710, 716, 717, 67 L. Ed. 1194, 43 S. Ct. 694.

ceedings.[11] The question is not whether the period of delay in instituting condemnation proceedings in this case was too long per se.[12] The precise question presented is whether the Fourteenth Amendment sanctions the seizure and mutilation of property under a State statute that vests in the party exercising the power of eminent domain the absolute and exclusive power to determine at what stage of the mutilation the trial court shall direct that the property be viewed by commissioners who, in determining compensation and damages, must ascertain the value of the property before it was mutilated,[13] and whose view of the property is the controlling factor in the determination of that value and outweighs the testimony given after the view has been made.[14] Laying aside the details, the question is whether the State, in acquiring private property by eminent domain, may impose upon the owner a procedure by which it is exceedingly difficult, if not impossible, for him to obtain and present the primary evidence upon which compensation and damages are to be awarded. This

[11] Bragg v. Weaver, supra; Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 67 L. Ed. 1167, 43 S. Ct. 684.

[12] Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, 916; cert. denied 321 U. S. 799, 88 L. Ed. 779, 64 S. Ct. 940.

[13] Ch. of Highway Com. v. Parker, 14. Va. 25, 136 S. E. 496, 498; Ch. of Highway Com. v. Fletcher, 153 Va. 43, 149 S. E. 456, 457; Long v. Shirley, 177 Va. 401, 14 S. E. (2) 375, 379.

[14] Cranford Paving Co. v. Baum, 97 Va. 501, 24 S. E. 906, 907; Richmond & P. Electric Co. v. Seaboard A. L. Ry., 102 Va. 399, 49 S. E. 512, 514; Hunter's Adm'r. v. C. & O. R. Co., 107 Va. 158, 59 S. E. 415, 419, 420, 17 L. R. A. (N.S.) 124; Barnes v. Tidewater Ry. Co., 107 Va. 263, 58 S. E. 594-596; Appalachian Power Co. v. Johnson, 137 Va. 12, 119 S. E. 253, 259; Duncan v. State H. Com'r., 142 Va. 135, 128 S. E. 546, 549, 550; Fonticello Mineral Springs v. City of Richmond, 147 Va. 355, 137 S. E. 458, 462; Hannah v. City of Roanoke, 148 Va. 554, 139 S. E. 303, 307; Shirley v. Russell, 149 Va. 658, 140 S. E. 816, 818; Shoemaker v. U. S., 147 U. S. 282, 304-306, 37 L. Ed. 170, 13 S. Ct. 361; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 558-560, 54 L. Ed. 877, 30 S. Ct. 581; U. S. v. Wise, 131 Fed. (2) 851, 853. See also, Yeary v. Holbrook, 171 Va. 266, 198 S. E. 441, 445, 446.

is not a case of "dubious mistake in the appraisal of the evidence".[15] It is a case of withholding and destruction of the evidence by a State agency acting under the statute assailed. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."[16] The Commonwealth of Virginia has authorized a procedure "in absolute disregard of the owner's right to just compensation"[17] and contrary to the Fourteenth Amendment, in that the owner must wait until the original condition of his property, which is the very basis upon which the amount of the award is determined, has been completely removed by the State Highway Commissioner from the view of the commissioners appointed by the Court to view the land. "Such a system of condemnation" is not even "fair upon its face".[18] The statute assailed does not provide for the owner such procedure in regard to the inspection of the property as is appropriate to the Virginia method for determining the amount of the compensation and damages.[19] It is recognized that in shaping procedure the State may exercise wide discretion and is not disturbed by the Fourteenth Amendment unless it "offends some principle so rooted in the traditions and conscience of our people as to be ranked as fundamental".[20] It is conceded that in the taking of property by eminent domain the owner has no fundamental right to have his property viewed by com-

[15] Roberts v. N. Y., 295 U. S. 264, 278, 79 L. Ed. 1429, 55 S. Ct. 689.

[16] West Ohio Gas Co. v. P. U. Com., 294 U. S. 63, 69, 79 L. Ed. 761, 55 S. Ct. 316.

[17] McCoy v. Union Elevated R. Co., 247 U. S. 354, 363, 62 L. Ed. 1156, 38 S. Ct. 504.

[18] Roberts v. N. Y., 295 U. S. 264, 277, 79 L. Ed. 1429, 55 S. Ct. 689.

[19] Davidson v. The Board of Administrators, 96 U. S. 97, 105, 105, 24 L. Ed. 616; Anderson Nat. Bank v. Luckett, 321 U. S. 233, 246, 88 L. Ed. 499, 64 S. Ct. 599.

[20] Snyder v. Mass., 291 U. S. 97, 105, 78 L. Ed. 674, 677, 678, 54 S. Ct. 330.

missioners either before or after mutilation of the property, or to have the compensation and damages assessed before the mutilation. The contention is that when the State statute in mandatory language provides, as in Virginia it does provide without any question, that the property must be viewed by commissioners appointed by the Court to fix the compensation and damages,[21] and when the highest Court in the State adopts the following rules (a) that the view by the commissioners is the controlling factor in the determination of the compensation and damages,[22] (b) that the commissioners shall fix the amount of the compensation for the property taken by ascertaining the market value of the property in its condition immediately before the taking, and (c) that in fixing the amount of the damages to the residue of the property the commissioners shall ascertain the amount that represents the difference between the market value of the residue in its condition immediately before the taking and the market value thereof in its condition immediately after the mutilation has been completed,[23] then under those particular

[21] "Proceedings for condemnation hereunder shall be instituted and conducted in the name of 'State Highway Commissioner' * * * Upon or after the filing of the petition as aforesaid, the Commissioner shall give ten days' notice * * * of his intention to apply to the proper court or judge * * * for the appointment of commissioners to ascertain what will be a just compensation for the land * * * proposed to be condemned for such uses and to award the damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of the highway * * *. Upon the selection of the commissioners, the court, or the judge thereof in vacation, shall direct them, in the custody of the sheriff or one of his deputies * * * to view the land described in the petition with the landowner and the State Highway Commissioner, or any representative of either party being allowed to be present and none other, unless otherwise directed by the court; and upon motion of either party, the judge shall accompany the commissioners upon their view of the land. Upon the completion of the view, the court or the judge in vacation, shall hear the testimony in open court on the issues joined * * *." Section 4969(2), Virginia Code 1942.

[22] Cases cited in note 14, supra.

[23] Cases cited in note 13, supra.

conditions, in order to have a hearing that is "full and candid," [24] the owner has a fundamental right to have his property viewed before it has been disfigured by the mutilation to such an extent that the condition of the property immediately before the taking is not apparent to the commissioners when they view the property; and the procedure should be such as is appropriate for safeguarding this right. A substantial federal question is presented, in that the statute assailed expressly removes from the procedure the owner's opportunity to safeguard this right; and no real opportunity to protect against an inadequate assessment of the compensation and damages is afforded to the owner by the allowance of testimony before the commissioners after they have viewed the property in its mutilated condition. [25] Presence of the owner at the viewing of the property bears only a "shadowy relation" [26] to the amount to be awarded; but when the amount to be awarded as compensation and damages is based primarily upon the value of the property in its original condition, and is measured and controlled primarily by impressions made upon the commissioners when they view the property, the "inevitable effect" of which is "that of evidence", then for the owner the viewing of the property by the commissioners before the original condition thereof has been removed through mutilation bears "relation, reasonably substantial to the fulness of his opportunity" to establish the amount of the just compensation and damages to which he is en-

[24] Roberts v. N. Y. 295 U. S. 264, 278, 79 L. Ed. 1429, 55 S. Ct. 689.

[25] Saunders v. Shaw, 244 U. S. 317, 319, 61 L. Ed. 1163, 37 S. Ct. 638; Bragg v. Weaver, supra; Joslin Mfg. Co. v. City of Providence, supra; Brinkerhoff-Faris T. & S. Co. v. Hill, 281 U. S. 673, 682, 74 L. Ed. 1107, 50 S. Ct. 451; American Surety Co. v. Baldwin, 287 U. S. 156, 168, 77 L. Ed. 231, 53 S. Ct. 98; Snyder v. Mass., 291 U. S. 97, 116, 121, 78 L. Ed. 674, 54 S. Ct. 330; Morgan v. U. S., 298 U. S. 468, 480, 80 L. Ed. 1288, 56 S. Ct. 906; Ohio Bell Tel. Co. v. Public U. Com., 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 57 S. Ct. 724.

[26] Snyder v. Mass., 291 U. S. 97, 108.

titled.[27] If in *Snyder* v. *Massachusetts* the gas pumps had been material items in Snyder's defense, and if the Commonwealth of Massachusetts had permitted the District Attorney to remove the pumps from the scene before the jury made the view, undoubtedly the accused would have been deprived of a right "ranked as fundamental", even though the accused had been afforded every opportunity to introduce at the trial, after the jury had made the view, evidence to show the condition of the premises before the District Attorney, in the exercise of his "discretion", removed the pumps from the view of the jury. The act of removal would have been considered as "an act of tyranny".[28] There is no more reason for allowing the State Highway Commissioner of Virginia to remove and destroy material evidence, in the exercise of his "discretion", than there would have been for allowing the District Attorney to remove the gas pumps. The arbitrary withholding of material evidence is just as intolerable in civil as it is in criminal proceedings, particularly where, as in the Virginia condemnation procedure,[29] the determination of those to whom the evidence would be submitted "exacts and receives a proper deference from courts".[30] There is no necessity for injecting into the condemnation procedure impediments in the form of administrative discretion, which may destroy material evidence and may coerce the owner. The administrative discretion of the State Highway Commissioner of Virginia may be appropriately exercised in matters of highway construction, but his discretion is "perverted from its proper function" when it is injected

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[27] Snyder v. Mass., 291 U. S. 97, 105, 106, 121.

[28] Snyder v. Mass., 291 U. S. 97, 117, 78 L. Ed. 674, 54 S. Ct. 330.

[29] Cases cited in note 14, supra.

[30] Ohio Bell Tel. Co. v. Public U. Com., 301 U. S. 292, 304, 81 L. Ed. 1093, 57 S. Ct. 724.

into matters of procedural due process and used to frustrate a fundamental right and to oppress one who is subjected to its control.[31] In the seizure and mutilation of the property in this case, the procedure of the statute assailed was imposed upon the owner to the fullest extent, and the necessary result was to deprive him of his property without just compensation. The original condition of the property and of the residue of the owner's property was removed from the view of the commissioners by the deliberate act of the State Highway Commissioner of Virginia in holding off the viewing of the property until he completed the mutilation, rendering it impossible for the commissioners to view the property in its original condition.[32] As a result of the disfigurement of the property the commissioners were led to believe that the property in its original condition was much less valuable than

[31] Dissent in Reed v. Allen, 286 U. S. 191, 209, 76 L. Ed. 1054, 52 S. Ct. 532. The compensation mandate of the 5th Amendment guards against an oppressive rule under which the Federal Government by manipulating "the form of its proceeding," mutilates the property interest, and "chops it into bits." (U. S. v. Gen. Motors Corp., No. 76, October Term, 1944, 89 L. Ed. 379, 384, 385.) Likewise, the due process clause of the 14th Amendment should guard against an oppressive rule under which a State agency manipulates the time for instituting the proceeding and meanwhile "chops" and disfigures the property. (Cases cited in note 36, supra.)

[32] The State Highway Commissioner of Virginia did not deny the allegations in paragraphs 7 and 8 of the answer which set forth in detail the condition of the property before and after the mutilation. That the commissioners appointed in condemnation proceedings can not view the property after drastic changes have been made and thereby determine the value of the property before the changes were made was clearly recognized by the Supreme Court of Appeals of Virginia in Hunter's Adm'r. v. C. & O. R. Co., 107 Va. 158, 59 S. E. 415, 419, 17 L.R.A. (N.S.) 124, where the Court said that "it was about five years after their report was made * * * before the commissioners were called upon to state the grounds of their award, and this after all vestige of the property condemned had been destroyed and the grounds * * * appropriated for railroad purposes, rendering another view of Hunter's property as it was when taken impossible." See also Lorillard Co. v. Clay, 127 Va. 734, 104 S. E. 384, 387 (view after 18 months delay).

it actually was.[33] The compensation and damages awarded by the commissioners were $10,200 less than the amount claimed by the owner, who of all those participating in the proceedings was the only one who was thoroughly familiar with the property in its condition immediately before the taking.[34] The coercive power bestowed by the statute assailed was openly and defiantly asserted against the owner in an attempt to force him to settle for an amount which was approximately one-ninth of the amount which he claimed in his answer, one-fourth of the amount awarded by the commissioners, and two-thirds of the amount which the Senior Highway Engineer stated at the hearing to be due.[35]

Question of compensation for use of property. The owner's right to compensation for the use of his property, the use being based entirely upon the statute assailed, presents a substantial federal question, in that (a) the due process clause of the Fourteenth Amendment of the Constitution of the United States prohibits a State from taking and using private property without paying just compensa-

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[33] An allegation to this effect in paragraph 9 of the answer was not denied, the State Highway Commissioner of Virginia asserting in paragraph 9 of his motion to strike merely that the commissioners could go on the property and "visualize the conditions and value of the property and award just compensation," thus admitting that the conditions to be visualized were those existing after the disfigurement.

[34] For the property taken the owner claimed $3,700 (par. 1 of answer), and the amount awarded was $1,500. For damages to the residue the owner claimed $14,500 (pp. 139, 149, 150, 153-156 of transcript of testimony), and the amount awarded was $6,500.

[35] The Senior Highway Engineer, T. W. Ross, testified that the amount offered the owner before the mutilation was too low and should have been fifty per cent higher (pp. 92, 100, 101, 102 of transcript of testimony; also p. 172, owner's undisputed testimony of warning that rejection of offer would result in mutilation and delay).

tion therefor,[36] (b) just compensation must be paid for the unauthorized use of property by one who is authorized to acquire it by eminent domain,[37] and (c) since the use in this case is based upon the statute assailed the use is unauthorized if the statute is unconstitutional.[38] The void ab initio theory applies because there is no ground in this case for the application of estoppel or of the de facto theory or of any of the other theories that have been advanced to justify acts founded upon an unconstitutional enactment.[39] There are no "particular relations" in this case, no "particular conduct", no "Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application."[40] The State Highway Commissioner of Virginia deliberately imposed the nefarious procedure permitted by the statute assailed, in defiance of the owner's objections and of the injunction suit brought by the owner in which he promptly and persistently resisted the mutilation of the property, expressly

[36] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 246, 41 L. Ed. 979, 988, 17 S. Ct. 581; A. Backus Jr. & Sons v. Fort Street Union Depot Co., 169, U. S. 557, 565, 42 L. Ed. 853, 857, 18 S. Ct. 445; Appleby v. Buffalo, 221 U. S. 524, 532, 55 L. Ed. 838, 842, 31 S. Ct. 699; McGovern v. New York, 229 U. S. 363, 370, 57 L. Ed. 1228, 33 S. Ct. 876, 46 L.R.A. (N.S.) 391; McCoy v. Union Elevated R. Co., 247 U. S. 354, 363, 365, 62 L. Ed. 1156, 38 S. Ct. 504; Dohany v. Rogers, 281 U. S. 362, 366, 74 L. Ed. 904, 50 S. Ct. 299; Roberts v. N. Y., 295 U. S. 264, 79 L. Ed. 1429, 55 S. Ct. 689.

[37] Hustead v. Barron, 75 Fed. (2) 169, 170; Fletcher v. Delaware L. & W. R. Co., 79 Fed. (2) 306, 310; Evalyn Bldg. Corp. v. City of New York, 257 N. Y. 501, 178 N. E. 771, 773; Carter v. Town of Pearisburg, 173 Va. 346, 4 S. E. (2) 428, 429.

[38] Norton v. Shelby County, 118 U. S. 425, 442, 30 L. Ed. 178, 6 S. Ct. 1121; Chicago, etc., R. Co. v. Hackett, 228 U. S. 559, 566, 57 L. Ed. 966, 33 S. Ct. 581; Nichols v. City of Cleveland, 247 Fed. 731 (certiorari denied, 246 U. S. 668, 62 L. Ed. 930, 38 S. Ct. 336).

[39] Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 374, 84 L. Ed. 329, 60 S. Ct. 317.

[40] Ibid.

claiming that the statute violates due process,[41] and also in the face of a decision of the highest Court in the State of West Virginia, in which the Court denounced and declared unconstitutional a companion statute designed to give the State Highway Department of West Virginia the same control of the condemnation procedure.[42]

Question of interest on damages awarded. The ruling denying the claim for interest on the amount awarded as damages presents a substantial federal question in that (a) where a State Court adopts a rule which operates to deprive the owner of just compensation the owner is deprived of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States,[43] and (b) where the property is taken and mutilated and damage is thereby caused to the residue of the owner's property, a ruling denying interest from the time of taking on the amount subsequently awarded as damages operates to deprive the owner of just compensation, in the absence of circumstances showing that the owner alone was responsible for the delay in payment.[44] The State Highway Commissioner of Virginia has admitted that the owner was not responsible for the delay from October 15, 1941, when the property was seized, until June 17, 1943, when the condemnation proceedings were instituted, a pe-

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[41] Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, 916 (cert. den., 321 U. S. 799, 88 L. Ed. 779, 64 S. Ct. 940).

[42] McGibson v. Roane Co. Court, 95 W. Va. 338, 121 S. E. 99.

[43] Cases cited in note 36, supra.

[44] Jacobs v. U. S., 290 U. S. 13, 78 L. Ed. 142, 54 S. Ct. 26, 96 A. L. R. 1; U. S. v. Southern States, 33 F. Supp. 519, 118 Fed. (2) 79 (reversed on other grounds, 319 U. S. 266, 87 L. Ed. 1390, 63 S. Ct. 1047); Schnull v. Indianapolis Union R. Co., 190 Ind. 572, 131 N. E. 51; Pet. of State Highway Com'r v. Morrison, 279 Mich. 285, 271 N. W. 760; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123.

riod of twenty months.[45] From April 22, 1944, when the owner filed his answer in the condemnation proceedings, until August 11, 1944, when final judgment was entered by the Circuit Court of Fairfax County, Virginia, a period of approximately four months, the delay was due to the time required for the pleadings, argument, hearing, and the preparation and entry of final judgment in the condemnation proceedings, and it has never been contended by the State Highway Commissioner of Virginia that the owner was responsible for that delay or that the owner should not have interest for that period of time. Thus the State Highway Commissioner conceded that the owner is entitled to interest for a period of approximately two years, from October 15, 1941, until June 17, 1943, and from April 22, 1944, until August 11, 1944; yet the Court, ignoring this concession and without citing any basis whatever, refused to allow interest for any period of time prior to the final judgment. This error of the Court was "gross and obvious, coming close to the boundary of arbitrary action."[46] The

[45] The Attorney General of Virginia, in his brief filed in Bailey v. Anderson, supra, stated that after completion of the highway the condemnation proceedings were instituted, and that at the instance of the owner the proceedings were held up pending a decision by the Supreme Court of Appeals of Virginia in the injunction suit, and then he stated that "it is to be noted that the postponement of the actual acquisition of title to the land is no longer due to the action of the State Highway Commissioner, but to the action of the appellant." (Statement of Attorney General exhibited on pages 67 and 68 of appendix to petition for certiorari and brief in No. 829, October Term, 1943.) In paragraph 4 of the motion to strike filed by the State Highway Commissioner in the condemnation proceedings, he stated that "a substantial part of the delay in the payment of compensation has been the result of the action of Bernard B. Bailey in insisting that the condemnation proceedings be delayed until the termination of the injunction suit," and that the defendant is not entitled to any interest for "such portion of the delay which has been the result of his own actions," and that "so much of paragraph 3 of said pleading of Bernard B. Bailey which claims interest for such period which resulted from the delay caused by Bernard B. Bailey, be stricken from said pleading and record."

[46] Roberts v. New York, 295 U. S. 264, 277, 79 L. Ed. 1429, 55 S. Ct. 689.

delay in the condemnation proceedings for approximately nine months, from June 17, 1943, when the proceedings were instituted, until March 20, 1944, when the State Highway Commissioner of Virginia moved for the appointment of commissioners, occurred during the pendency in the Supreme Court of Appeals of Virginia of the owner's injunction suit in which he sought to enjoin the destruction of the operation of his grist mill by the construction of the highway, and attacked the statute under which the property was seized, the same statute that is now assailed. It is not disputed, however, that the owner and the State Highway Commissioner agreed to postpone the condemnation proceedings during that time,[47] and it has never been contended by the State Highway Commissioner that the owner agreed that during that time he would not claim interest on the damages to be awarded in the condemnation proceedings.[48] The State Highway Commissioner was not compelled by the Court, certainly not by the owner, to delay the proceedings. The State Highway Commissioner could have insisted that the proceedings be carried out pending the injunction suit, just as he did insist on March 20, 1944, when he moved the Court to appoint commissioners in the condemnation proceedings while the owner was seeking a review upon certiorari by the Supreme Court of the United States of the decision of the Supreme Court of Appeals of Virginia in the injunction suit. The election of the State

[47] "By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right of the State Highway Commissioner to condemn the property in question." Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, 916. While the owner contended that this statement does not reflect the real issues before the Supreme Court of Appeals, the statement that the State Highway Commissioner consented to the postponement of the condemnation proceedings can not be disputed.

[48] There is no ground for an implied waiver of interest. The Court will not "presume acquiescence in the loss of fundamental rights." Ohio Bell T. Co. v. P. U. C. of Ohio, 301 U. S. 292, 307.

Highway Commissioner to postpone the condemnation proceedings from June 17, 1943, until March 20, 1944, is no ground for denying interest to the owner on the damages which were withheld from the owner during that time.[49] Finally, the deposit made by the State Highway Commissioner under the statute assailed was not effective to stop interest on the amount deposited, if the statute is held to be unconstitutional;[50] and the deposit made on August 19, 1944, pursuant to the order of the Court, was not effective to stop interest if in this petition for appeal the owner is successful.[51]

Respectfully submitted,

BERNARD B. BAILEY,
pro se.

[49] Bloom, S. & G. v. Mitchell, 289 Mass. 376, 194 N. E. 114; Borst v. Young, 302 Mass. 124, 18 N. E. (2) 544.

[50] Norton v. Shelby County, supra; Chicago, etc. R. Co. v. Hackett, supra.

[51] Schnull v. Indianapolis U. R. Co., supra.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN SUPPORT OF PETITION FOR APPEAL

BERNARD B. BAILEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

BRIEF IN SUPPORT OF PETITION FOR APPEAL

Reference to Decision Below

The final judgment of the Supreme Court of Appeals of Virginia (R. 41), was rendered without formal opinion, affirming a judgment of the Fairfax Circuit Court in condemnation proceedings. The final judgment in an equity suit was rendered with formal opinion in 182 Va. 70, 27 S. E. (2) 914, and petition for certiorari to review that judgment was denied (321 U. S. 799). The record in the latter case (No. 829, Oct. Term 1943) is a part of the record of the present petition for appeal by stipulation of the parties (R. 38, par. 5 of stipulation).

Jurisdiction of Supreme Court of the United States

A complete jurisdictional statement has heretofore been filed and printed, and by order on April 30, 1945, further consideration of the question of the jurisdiction of this Court was postponed to the hearing of the case on the merits, and the case was transferred to the summary docket (R. 53). Jurisdiction is based upon Sec. 237(a) of the Judicial Code as amended. Briefly, the Supreme Court of Appeals of Virginia, the highest Court of Virginia, has affirmed (1) the ruling of the Fairfax Circuit Court that Sections 1969 j (4), and 1969 j (6), Virginia Code 1940, are not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, (2) the ruling denying the claim for compensation for the use of the appellant's property for highway purposes prior to acquisition of title, and (3) the ruling denying the appellant's claim for interest on the damages awarded for injuries to the residue of the appellant's property from the highway construction. It is contended that this Court has jurisdiction under Sec. 237(a) of the Judicial Code, as amended, to review not only the ruling on the statute but also the rulings as to compensation for use and interest on the damages awarded.

Statement of the Case

This controversy was precipitated by the appellee's seizure of the appellant's real property for the purpose of constructing a highway.

Description of the appellant's property—The appellant's property in Fairfax County, Virginia, is improved in part by a grist mill and a restored residence of colonial type. In the summer of 1941, the mill and residence fronted on a state highway near a curve, the residence standing on a ridge with the mill below. In the rear of the mill and resi-

dence there was a meadow of approximately ten acres bounded by a stream and by a mill race, the latter running in a winding course at the foot of a steep hill on the property. The hill, from which could be seen the countryside for miles around, formed part of a tract sloping to the mill race, which was suitable for residential development with the meadow, mill, and water fall in the distance (R. 6, 7). The mill was operated by an overshot wheel which received its power from water flowing from the stream and through the race. It was essential that the mill race be kept free from obstructions in order to maintain a water flow of sufficient quantity to operate the mill wheel, and in order to prevent the water from flowing over and breaking the bank of the race during heavy rains (R. 22, 23, No. 829).

Appellee's plans for relocation of highway, and appellant's objections and requests—In September, 1941, the appellee adopted a plan for the relocation of the highway on a course behind the mill and residence. The plan called for the construction of the highway through the meadow, within 150 feet from the residence, on a fill to be approximately 1100 feet long with a maximum height of 23 feet, and thence through the mill race and adjacent hill, cutting a gorge in the hill to be 37 feet in maximum depth, 127 feet wide, and approximately 300 feet long. The plan called for the laying of cement pipes in the race under the new highway, running between 90 and 100 feet in a bend following the course of the race. (R. 24, No. 829; R. 7, 16, 17, 21, 22.) In September and October, 1941, the appellant presented to the appellee's representatives his objections to the plan on the ground that it would be exceedingly difficult, if not impossible, to keep the pipes free from obstructions; that during heavy rain storms it would be impossible to remove obstructions, and that consequently the water would rise in the race, cut through the race bank, and cause washouts which would arrest the

operation of the mill and would be exceedingly expensive and difficult to repair. The appellant pointed out to them that the injuries to the race would be recurring injuries, beyond the power of the appellant to prevent, and would cause a complete breakdown of the race and a permanent stoppage of the operation of the mill by water power. The appellant requested them to make a survey and to prepare a plat to show what might be done to avoid these injuries by lightening up the curvature of the existing highway in front of the mill and residence, or in the alternative to delay the construction of the highway until the appellant could file suit to test the appellee's authority to destroy or seriously impair the operation of the mill. These requests were refused (R. 25-28, No. 829).

Appellee's offer and warning—The appellant, declining to accept $2,000 offered by the appellee as compensation for the land to be taken and damages to the residue, was warned by the appellee's representative that if he continued to refuse to accept the offer made to him the consequences would be that the appellee, acting pursuant to law, would enter upon the property and construct the highway, and that under the law the appellant would have to wait until the completion of the highway, and 60 days thereafter, before he could obtain a settlement (R. 25, 26).

Appellee's notice, deposit, and entry—The appellant continued in his refusal to accept the appellee's offer, and on October 13, 1941, the appellee, acting under Sections 1969j(4) and 1969j(6) of the Virginia Code 1940, which is the statute assailed in this case, notified the appellant that a certificate of deposit of $1,500 had been filed in the office of the Clerk of the Circuit Court of Fairfax County so that construction of the highway could proceed according to plan, and on October 15, 1941, entered upon the property and proceeded with the construction of the highway as planned (R. 27, No. 829).

Appellant's equity suit—On October 21, 1941, the appellant filed suit against the appellee in the Fairfax Circuit Court alleging, *inter alia*, that the construction of the highway as planned would destroy or seriously impair the operation of the mill; that it was not necessary for the appellee to destroy the operation of the mill because an acceptable highway could be constructed on the existing course in front of the mill; that the appellee was not authorized to destroy unnecessarily the operation of the mill which was devoted to a public use; that already an immense quantity of earth had been dug out of the hill adjacent to the race and that if the construction should be continued at the rate it was proceeding a deep cut or gorge through the hill would be accomplished before the appellant would be able to have a hearing in court, which would cause irreparable damage; that the appellant was not financially able to furnish adequate bond for a temporary restraining order; that the statute upon which the appellee relied in taking the property is unconstitutional in that it authorizes the appellee to postpone the condemnation proceedings for an unreasonable length of time; and praying that the statute be declared unconstitutional, that appellee be enjoined from the unlawful construction of the highway, and that the land be restored to its former condition, and for general relief. The bill did not pray for an injunction against the filing of condemnation proceedings, and did not seek in any way whatsoever to prevent or delay the filing of condemnation proceedings (R. 21-29, No. 829). The appellee was at liberty to file condemnation proceedings at any time he chose to do so, but instead of filing condemnation proceedings the appellee filed a demurrer to the appellant's bill in equity. The demurrer was sustained by the Court, and final decree dismissing the bill was entered on November 25, 1942 (R. 30-32, No. 829).

Filing of condemnation proceedings by appellee while appeal was pending in appellant's equity suit—On February 18, 1943, petition for appeal was filed by the appellant in the Supreme Court of Appeals of Virginia to review the final judgment of the trial Court in the equity suit, and on March 5, 1943, the appeal was awarded (R. 1-21, No. 829). On June 17, 1943, the appellee filed in the Fairfax Circuit Court a petition in condemnation proceedings to acquire title to the appellant's land used as the right of way for the relocated highway, and to fix the compensation and damages, if any, to be paid to the appellant (R. 1, 2).

Appellee's application for appointment of commissioners in the condemnation proceedings, and postponement thereof until appeal in equity suit was decided—In July, 1943, appellee applied to the trial Court for the appointment of commissioners in the condemnation proceedings to view the land, as required by statute (Virginia Code 1940, Section 1969j(2)), which provides that upon the selection of the commissioners, the court or the judge in vacation "shall direct them, in the custody of the sheriff or one of his deputies * * * to view the land described in the petition with the landowner and the State Highway Commissioner, or any representative of either party being allowed to be present and none other, unless otherwise directed by the Court; and upon motion of either party, the judge shall accompany the commissioners upon their view of the land." The statute provides also that "upon completion of the view, the court or the judge in vacation, shall hear the testimony in open court on the issues joined." On the date of this application for the appointment of commissioners to view the land, the appellee had already completed the excavations and fills in the construction of the relocated highway exactly as planned, so that even if the commissioners had been appointed it would have been impossible for them to view the land in its original condition

(R. 7). On July 9, 1943, the appellant filed a plea alleging that the appellee had no authority to condemn the land "for the reasons particularly set forth in the petition filed * * * on the 21st day of October, 1941 * * *" in the equity suit (R. 2, 3). At the instance of the appellant, and by "consent of both sides," action in the condemnation proceedings was postponed pending a decision on the appeal in the equity suit (R. 36, 37, No. 829).

Appellee's second application for appointment of commissioners in condemnation proceedings, and appellant's application for postponement thereof until disposition of petition for certiorari in equity suit—On December 6, 1943, judgment was entered in the Supreme Court of Appeals, affirming the final decree of the trial Court in the equity suit. The Court upheld the appellee's power to destroy the operation of the mill, and denied the appellant the right to attack the statute under which the property was seized (R. 33-37, No. 829). On January 25, 1944, petition for rehearing was denied (R. 52, No. 829). In March, 1944, appellee applied to the trial Court for the appointment of commissioners in the condemnation proceedings. On March 16, 1944, appellant filed a plea similar to his plea filed on July 9, 1943 (R. 3, 4), and manifested his intention to file in this Court a petition for certiorari in the equity suit, and on March 30, 1944, the petition was filed. On March 31, 1944, the trial Court fixed April 7, 1944, as the date for entering an order appointing the commissioners. On April 4, 1944, appellant applied to a justice of the Supreme Court of Appeals for an order staying the condemnation proceedings until this Court could pass on the petition for certiorari, and the application was denied. On April 6, 1944, similar application was made to the judge of the trial Court, which was denied, but the condemnation proceedings were postponed until similar application could be made to a justice of this Court, which was done on April 6, 1944

(R. 3, 4). On April 8, 1944, both the petition for certiorari and the petition for stay were denied by this Court (321 U. S. 799).

Appellant's answer in the condemnation proceedings—On April 22, 1944, the appellant filed in the condemnation proceedings a plea, claiming $3,700 as compensation for the land taken for the highway, $21,100 as damages to the residue, interest on the amount awarded as compensation and damages from October 15, 1941, when the land was [illegible]ized, until date of payment, and $200 a month for the unlawful use of the land for highway purposes. The appellant alleged that he was entitled to be compensated for the unlawful use of the land because the statute, Virginia Code, Sections 1969j(4) and 1969j(6), under which the land was mutilated and is being used violates the due process clause of the Fourteenth Amendment of the Constitution of the United States, in that it allowed the appellee to mutilate and disfigure the property and at the same time it restrained the appellant from acting on his own motion and from compelling the appellee to act to have commissioners appointed to view the land before the mutilation and disfigurement were completed. The appellant alleged that he had the right to attack the statute because at the time the appellee instituted the condemnation proceedings the appellant's property had been disfigured by the appellee to such an extent that commissioners appointed by the Court to view the land could not by an inspection of the property determine the value of the entire property as it existed before the disfigurement. The appellant alleged that if the Court should deny compensation for the use already made of his property and allow the use to continue until acquisition of title by the appellee, it would operate to deprive the appellant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States because

the use is based entirely upon the unconstitutional statute assailed by the appellant. The appellant prayed, *inter alia*, for an injunction against the use of the land until title is acquired (R. 4-8).

Appellee's motion, in the condemnation proceedings, to strike the appellant's plea—On May 12, 1944, the appellee filed a motion to strike the appellant's plea (R. 8). He claimed that appellant was not entitled to interest for the delay caused by the appellant "in insisting that the condemnation proceedings be delayed until the termination of the injunction suit" (R. 9), and he thereby admitted that for all other delay in payment the appellant is entitled to interest. The appellee claimed that the appellant was not entitled to additional compensation for the use of the land; that in the equity suit the Supreme Court of Appeals upheld the constitutionality of Sections 1969j(4) and 1969j(6) "insofar as they affect this proceeding" (R. 10); that the commissioners to be appointed by the Court could go on the property and "visualize the conditions and value of the property and award just compensation" (R. 10), but he did not deny the allegations in the appellant's plea (R. 6, 7), which set forth in detail the condition of the property before the mutilation and disfigurement and the condition thereof after the excavations and fills on the property were completed.

Ruling of the trial court in the condemnation proceedings, on the appellee's motion to strike, and order appointing commissioners to view the land—On June 9, 1944 the Court overruled the motion to strike, except that the Court ordered that paragraph 4 of the appellant's plea be stricken, in which paragraph appellant claimed compensation for unlawful use of the property, and the Court expressly ruled that the statute upon which the use was based, Virginia Code, Sections 1969j(4) and 1969j(6), is not in violation of the due process clause of the Four-

teenth Amendment of the Federal Constitution, to which ruling of the Court the appellant excepted; and the Court ruled that the pleading of the appellant should be considered as his grounds of defense (R. 12). The Court appointed commissioners and issued an order that "the Commissioners in the custody of the Sheriff of the County, shall view the land described in said petition with the landowner and the attorneys of record for the landowner, the agent and attorney for the State Highway Commissioner, and a representative of the State Department of Highways" (R. 13). This order was in obedience to the mandate of Virginia Code, Section 1969j(2), which provides: "Upon the selection of the commissioners, the court, or the judge thereof in vacation, shall direct them, in the custody of the sheriff or one of his deputies * * * to view the land described in the petition with the landowner and the State Highway Commissioner, or any representative of either party being allowed to be present and none other, unless otherwise directed by the court * * *."

Viewing of the property, and hearing—In obedience to the order of the Court, the commissioners viewed the property in the company of those mentioned in the order, and accompanied by the trial judge, in the forenoon of July 11, 1944, and upon return to the courthouse testimony was taken before them and the trial judge in the afternoon of July 11, 1944, and on July 12, 1944 (R. 14, 15, 19).

Disposition of the mill issue by stipulation in the condemnation proceedings; and reduction in claim for damages to residue—By stipulation of the parties (R. 19, 20) entered into at the hearing on July 12, 1944, the appellee assumed the burden of keeping clear of obstructions the pipes under the highway and also the tail race where located on the right of way, "so as not to affect the operation of the mill, and so as not to prevent the normal flow

of water to the mill and through the tail race" during the period and time that the mill will be operated, and in consideration of the appellee's assumption of this burden the appellant waived claim to damages to the mill and the operation thereof due to the construction of the new highway, and thereby reduced his claim for damages to the residue of his property from $21,100 to $14,500, calculated as follows:

	Value before construction	Value after construction
Colonial residence and 15 acres	$15,000	$7,000 (R. 22, 23)
Cottage and 10 acres	6,000	2,500 (R. 24, 25)
Barns and outbuildings	3,500	500 (R. 23, 24)
Mill race	1,500	1,500
Mill	7,000	7,000
10 acres, formerly lake and dam	500	500
	33,500	19,000
	19,000	
	14,500	

The appellee apparently intends to make a point of the confusion in the valuation of the parcels. In the Attorney General's designation of the testimony to be printed he singled out one statement (R. 26), but he failed to designate the printing of the questions of counsel for the appellee which caused the confusion. The attempt was made by counsel for appellee to have the appellant give the valuation of the property on one side of the new road and the valuation of the portion on the opposite side. That was not a logical division by which to measure the value of the property before the new road was cut, but it did accomplish the purpose of confusing the matter before the Court and the commissioners. The omission in the printing of

the questions of counsel for the appellee simply adds to the confusion.

Report of the commissioners—On July 12, 1944, the commissioners filed their report, in which they made a finding "that for the fee simple title of the Defendant in the 3.98 acres of land, more or less, the sum of $1,500.00 will be a just compensation, and that there was $6,500.00 damages resulting to the adjacent or other property of the owner from the construction and operation of said highway . . ." The report recited the stipulation by which damages to the mill were waived, and the commissioners stated in the report that they had "considered this stipulation and do hereby make it a part of our findings and our report" (R. 28, 29). Exceptions to the report, filed by both parties, were overruled by the Court, and the report was confirmed (R. 29-34).

Claim for interest, the trial court's ruling thereon, and the appellee's deposit—The appellant's claim for interest was not submitted to the commissioners. On August 11, 1944, the appellant presented to the Court his claim for interest from October 15, 1941, until date of payment, on $6,500, the amount awarded by the commissioners as damages, and waived claim for interest on $1,500, the amount awarded for the land taken, and moved the Court to allow an amendment of the answer to reflect his claim for interest only on the amount awarded as damages (R. 35). In the final decree entered on August 11, 1944, the Court stated its opinion "that the defendant is not entitled to interest on the amount awarded by the Commissioners," and the Court adjudged that the motion to amend be denied and that "the defendant's claim for interest on the $6500.00 from October 15, 1941, until payment, be and the same is hereby denied" (R. 35). The Court ordered that the appellee deposit with the Clerk for the benefit of the appellant the sum of $8,000, to include any deposit thereto-

fore made, and that such amount be paid by the Clerk in accordance with further orders of the Court, and to bear interest at six per cent per annum from August 11, 1944, until paid (R. 35, 36). To all of these rulings the appellant excepted. On August 19, 1944, the appellee deposited with the Clerk the sum of $8,011.84, complying with the order of the Court (R. 37).

Petition for writ of error, and ruling of the Supreme Court of Appeals of Virginia—The appellant signified his election to apply to the Supreme Court of Appeals of Virginia for a writ of error to the rulings of the Circuit Court contained in the final decree and to the rulings of the Circuit Court made on June 9, 1944, on the appellee's motion to strike, and the Circuit Court suspended judgment for ninety days conditioned upon appeal bond being filed (R. 36, 37). The appellant filed the appeal bond, and duly applied to the Supreme Court of Appeals of Virginia for a writ of error to review the rulings of the Circuit Court. Three of the errors assigned were as follows: "1. In denying interest, from the time of entry on the property of plaintiff in error, on the amount awarded by the commissioners as damages, the Court allowed the taking of the property without just compensation in violation of Section 6 of the Virginia Constitution, and deprived plaintiff in error of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution. 2. The Court erred in holding that the statute under which the property was taken (Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6)) is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution. 3. In denying compensation for the use of the property, the use being based upon said statute, the Court deprived plaintiff in error of his property without due process of law contrary to the due process

clause of the Fourteenth Amendment of the Federal Constitution" (R. 39, 40). On November 22, 1944, an order was entered in the Supreme Court of Appeals of Virginia, reading as follows:

> "The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemnation proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and the said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court" (R. 41, 42).

No formal opinion was written by the Supreme Court of Appeals of Virginia.

Petition for appeal to the Supreme Court of the United States—On February 12, 1945, petition for appeal to this Court was presented to and refused by the Chief Justice of the Supreme Court of Appeals of Virginia, who expressed the opinion "that the petition should be presented to a Justice of the Supreme Court of the United States" (R. 42-47). On February 15, 1945, appeal was allowed by the Chief Justice of the United States (R. 47). On April 30, 1945, an order was entered in this Court as follows:

> "The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits, and the case is transferred to the summary docket. The Court desires to hear oral argument only upon the questions whether this Court has jurisdiction of the case, and whether appellant was denied interest

upon his condemnation award in violation of the Fourteenth Amendment". (R. 53).

Specification of Assigned Errors to Be Urged

Only three errors were assigned, and all of them are urged here, as follows:

"1. The Supreme Court of Appeals of Virginia erred in holding that the statute assailed, being Acts 1940, c. 380, p. 666, sections 4 and 6, Virginia Code Supp. 1940, now Virginia Code 1942, sections 1969j(4) and 1969j(6), under which the appellant's property was seized, mutilated, and used by the appellee for highway purposes, is not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, in that the statute assailed, by vesting in the appellee the power to enter upon and mutilate property and, while mutilating it, to control the time for instituting condemnation proceedings to determine the amount of compensation and damages to be paid, enables the appellee to manipulate a procedural phase of the condemnation, in a manner detrimental to the owner, by holding off the appointment of commissioners to view the property until the appellee has mutilated and disfigured it to such extent that when, in the exercise of the discretion conferred by the statute assailed, the appellee permits the commissioners to view the property they can not visualize the condition thereof as it was immediately before the seizure, the result being to render it exceedingly difficult, if not impossible, for the owner to establish the just compensation for the property taken and the damages to the residue, inasmuch as the Virginia law in condemnation cases is that the viewing of the property by the commissioners is the important and controlling factor in the determination of compensation and damages, outweighing the evidence adduced at the hearing held after the view has been made, and that the compensation is determined by ascertaining the value of the property taken immediately before the seizure, and the damages are determined by ascertaining the difference between the

value of the residue immediately before the seizure and the value thereof immediately after completion of the highway construction; and in that the unconstitutional power and control bestowed by the statute was deliberately and oppressively imposed by the appellee upon the appellant to his detriment and damage.

"2. The Supreme Court of Appeals of Virginia erred in denying to the appellant compensation for the use of his property taken for the highway, in that the use is unauthorized inasmuch as it is based entirely upon the unconstitutional statute assailed, and compensation for the unauthorized use of the property is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

"3. The Supreme Court of Appeals of Virginia erred in denying to the appellant interest on the amount awarded as damages to the residue of the appellant's property from the time of the commencement of the mutilation of the property by the appellee until the appellant receives payment, in that interest on the damages awarded is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States" (R. 44-46).

ARGUMENT

Summary of Argument

1. The statute assailed violates the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it injects into the mandatory procedure for viewing condemned property the absolute and inordinate discretion of the appellee to mutilate and disfigure the property before it is viewed.

The appellant and his property were subjected to and injured by the unconstitutional power conferred by the statute in that his property was mutilated and disfigured while the appellant was held powerless by the appellee's statutory control, and the appellee arbitrarily withheld the viewing of the property until it was impossible to view and value the property in its original condition which is the primary basis upon which compensation and damages are assessed.

II. The due process clause of the Fourteenth Amendment requires the payment of just compensation for the public use of private property prior to acquisition of title by eminent domain. Where the use is accomplished by an unauthorized and willful act, equitable principles as well as the principles of due process require that compensation be measured by the rental value of the property for the use to which it is devoted by the sovereign.

The use of the appellant's property was unauthorized and willful in that it was based upon an unconstitutional statutory power, void *ab initio*, which was exerted against the appellant's property, arbitrarily, oppressively, and with full knowledge that the appellant's constitutional rights were being violated. The appellant is entitled to the rental value for highway purposes, and not simply interest on the amount awarded for the fee simple title to the land used.

III. The right to interest on damages awarded in condemnation proceedings from the time the damage is inflicted to the date of payment is a fundamental right protected by the due process clause of the Fourteenth Amendment.

The denial of interest on the damages awarded was gross and obvious in that the Court by penalizing the appellant for the delay in payment completely ignored the fundamental rules of fairness clearly indicated by the undisputed record facts.

I. Invalidity of Statute Assailed

A. Provisions of Statute

Virginia Acts 1940, c. 380, sections 4 and 6; Virginia Code 1942, Sections 1969j(4), and 1969j(6)

Section 1969j(4), Virginia Code 1942, provides as follows:

"In addition to the exercise of the power of eminent domain, as provided hereinabove, the commissioner is hereby authorized to enter upon and take possession of such property and rights of way, for the purposes set out in section 1969j(1), as the commissioner may deem necessary, and proceed with the construction of such highway. Within sixty days after the completion of the construction of such highway, if the commissioner and the owner or owners of such lands are unable to agree as to compensation and damages, if any, caused thereby, the said commissioner shall institute condemnation proceedings, as hereinbefore provided; and the amount of such compensation and damages, if any, awarded to the owner in such proceedings shall be paid out of the State highway fund, the said commissioner to pay to the landowner or into court, or to the clerk thereof, for his benefit such sum as he shall estimate to be the fair value of the land taken and damage done, before entering upon such land for construction purposes, provided such payment shall in no wise limit the amount to be allowed under proper proceedings. It is the intention of this section to provide that such property and rights of way may, in the discretion of the commissioner, be condemned after the construction of the highway, as well as prior thereto, and to direct the fund out of which the judgment of the court in condemnation proceedings shall be paid, and to provide that in all other respects the provisions of this act shall apply, whether the property and rights of way are condemned before or after the construction of the highway; but the authorities

constructing such highway under the authority of this section, shall use diligence to protect growing crops, pastures, and to prevent damage to any property not taken. So far as possible, all rights of-way shall be acquired or contracted for, before any condemnation is resorted to."

Sec. 1969j(6), Virginia Code 1942, provides as follows:

"A certificate issued by the State Highway Commissioner and counter-signed by the Treasurer of Virginia, stating that any sum or sums of money designated therein will be paid pursuant to the order of any court or courts wherein condemnation proceedings under the provisions of this act are pending, when filed with the said court or courts, shall be deemed and held for the purpose of this act to be payment into the custody of such court or courts. Payment against any such certificate so issued and countersigned, when ordered by the court or courts named therein, shall be paid by the Treasurer on warrants of the Comptroller, issued on vouchers signed by the State Highway Commissioner. A duplicate of each such certificate so issued and countersigned shall be kept as a record in the office of the State Highway Commissioner and a copy thereof shall be filed with the Treasurer of Virginia."

B. Question of Res Judicata

As to the constitutionality of the statute. The decision in *Bailey* v. *Anderson*, 182 Va. 70 (R. 33, No. 829), is not res judicata as to the constitutionality of the statute in question. There the appellant contended that the statute violates the due process clause of the Fourteenth Amendment of the Constitution of the United States on the ground, as the Court stated it, that "the statute does not authorize the institution of condemnation proceedings until sixty days after the completion of the construction of the highway; that such construction might be indefinitely delayed; and that consequently the property owner might

be unreasonably delayed in being compensated for the taking of his property or the damage done thereto." The court declined to consider the constitutionality of the statute, stating that it was unnecessary to do so because the appellant "is now afforded a prompt remedy" in the pending condemnation proceedings, and that unless the appellant "can show that he has been damaged by the operation of the statute, the constitutional question which he seeks to raise is moot as to him" (182 Va. 70, 75, 76).

The ruling of the Court that the payment of compensation had not been unreasonably relayed had no reference to the mutilation and disfigurement of the property. Clearly, the Court recognized that the equity suit did not prevent the appellee from instituting condemnation proceedings because the proceedings were instituted while the equity suit was pending. The Court did not deny that because of the statute assailed, the appellant was unable to force the appellee to institute condemnation proceedings to have the property viewed before it was mutilated and disfigured. The appellee admitted the allegation in the appellant's plea (R. 7) that the mutilation and disfigurement were completed on June 17, 1943, when he instituted the proceedings. The decision of the Court in the equity suit cannot be considered, therefore, as a ruling that the appellee was justified in mutilating and disfiguring the property while he postponed the filing of condemnation proceedings.

As to the right to attack the statute. The decision in *Bailey* v. *Anderson,* 182 Va. 70 (R. 33, No. 829), is res judicata as to the right of the appellant to attack the statute on the ground that it grants to the appellee an unreasonable time, after seizure, in which to institute condemnation proceedings. The decision is not res judicata as to the right of the appellant to attack the statute on the ground that it allows the appellee "to enter and construct

the highway and mutilate and disfigure the property for highway purposes and at the same time restrains the owner from acting upon his own motion and from compelling the petitioner to act to have commissioners appointed to view the land before the mutilation and disfigurement are completed," which is the ground upon which the statute was attacked in the appellant's plea in the condemnation proceedings (R. 5) after the decision in *Bailey* v. *Anderson*, 182 Va. 70, had been rendered. The question of mutilation of the appellant's property while he was under the restraint of the statute and of his inability to have viewers appointed to view the property before completion of the mutilation and disfigurement was neither presented to nor discussed by the Court. The appellant was not obliged to present in his bill in equity the ground of attack presented later in his answer in the condemnation proceedings because he had no right to attack on that ground until the mutilation had been completed, and at the time the bill was filed the mutilation had just been started. Besides, the bill disclosed plainly that the appellant objected to the multilation (R. 27, 28, No. 829). Upon the completion of the mutilation the appellant was not obliged to amend his bill in the equity suit to present the ground of attack presented later in his answer in the condemnation proceedings because the amendment would have served only to apprise the appellee again of appellant's objection to the mutilation, and that would not have enabled the appellee to avoid the mutilation because it had already been accomplished. Therefore, the appellant rightfully waited until he filed his answer in the condemnation proceedings before presenting the second ground upon which he attacked the statute.

As to the appellee's right to open the question. Regardless of the extent of the decision in *Bailey* v. *Anderson*, 182 Va. 70, as to the validity of the statute in its application

to the facts of the controversy, or as to the appellant's right to assail the statute, the appellee is precluded from raising any question concerning it because in the condemnation proceedings he did not contend that the appellant should have presented his ground of attack earlier, the Circuit Court decided that the statute is constitutional (R. 12), thus recognizing that the appellant was injured by the unconstitutional feature presented in his answer and had the right to assail the statute, the Supreme Court of Appeals affirmed the decision of the Circuit Court (R. 41, 42), the appellee did not object to these decisions or appeal therefrom, and it is too late now for him to do so.[1]

C. Points Not in Dispute

Mutilation before payment. The appellant concedes that without infringing the Fourteenth Amendment of the Constitution of the United States a state may authorize the taking and mutilation of private property for highway purposes before payment of compensation and damages, or before condemnation proceedings are instituted, (a) where the statute does not establish a procedure for ascertaining compensation and damages that allows the highway authorities to control the time in which to institute condemnation proceedings,[2] or (b) where the law provides that the highway authorities shall have a reasonable time in which to complete the highway before the condemnation proceedings can be instituted but does not require that the property be viewed by those appointed to determine the compensation and damages.[3] "What is fair in one set of circumstances

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[1] *Stoll* v. *Gottlieb*, 305 U. S. 165, 169, 177; *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503.

[2] *Bragg* v. *Weaver*, 251 U. S. 57; *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668.

[3] *Simms* v. *Dillon*, 119 W. Va. 284, 193 S. E. 331, 113 A. L. R. 787.

may be an act of tyranny in others."[4] The appellant does not contend that aside from mutilation of the property the statute is invalid because of the length of the delay in determining the compensation and damages.

Viewing of property. The appellant concedes that without infringing the Fourteenth Amendment a state may require that compensation for private property taken for highway purposes and damages to the residue shall be determined without allowing the property to be viewed by those appointed to determine the amount to be paid to the owner (*Simms* v. *Dillon, supra*), or a state may require that the property be viewed by commissioners appointed to determine the compensation and damages, as provided in Section 1969j(2) of the Virginia Code.

D. Grounds of Invalidity

1. *The Unconstitutional Feature*

The statute assailed does not afford the procedural due process guaranteed by the Fourteenth Amendment of the Constitution of the United States, in that it injects into the Virginia system of viewing condemned property the absolute and unlimited power of the appellee to mutilate and disfigure the property before it is viewed. The constitutional infirmity of the statute is found in the appellee's combined power to mutilate the property and to manipulate the time for the view.

From the earliest times in Virginia, compensation for land taken by eminent domain, and damages to the residue, have been determined by viewers. The viewers may hear testimony as to compensation and damages, but the view outweighs the evidence adduced at the hearing, constitutes the controlling factor in the determination by the viewers

[4] *Snyder* v. *Mass.*, 291 U. S. 97, 117.

of the amount to be awarded, and it is the justification for the rule that the award of the viewers will not be disturbed by the Court in the absence of irregularity.[5]

Just compensation for the property taken is the value thereof immediately before the taking, and damages to the residue are measured by determining the difference between the value of the property immediately before the taking and the value immediately after the mutilation is completed. The value immediately before the taking is the chief element in determining just compensation and damages.[6] The statute grants to the appellee the absolute power to distort and destroy the evidence of that value, so that a view of the property after the mutilation gives to the viewers a false impression as to the value immediately before the taking.

2. Coercive Power Derived from Administrative Discretion

The appellee's power to manipulate the time for the view is dressed in the innocent garb of administrative discretion, shown in the following words of the statute (ante p. 18): "It is the intention of this section to provide that such property and rights of way may, in the discretion of the com-

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[5] *Mitchell* v. *Thornton*, 31 Grat. 164, 176, 177; *Cranford Paving Co.* v. *Baum*, 97 Va. 501, 24 S. E. 906, 907; *Richmond & P. Electric Co.* v. *Seaboard A. L. Ry.*, 103 Va. 399, 49 S. E. 512, 514; *Hunter's Adm'r* v. *C. & O. R. Co.*, 107 Va. 158, 59 S. E. 415, 419, 420, 17 L. R. A. (N. S.) 124; *Barnes* v. *Tidewater Ry. Co.*, 107 Va. 263, 58 S. E. 594-596; *Appalachian Power Co.* v. *Johnson*, 137 Va. 12, 119 S. E. 253, 259; *Duncan* v. *State H. Com'r*, 142 Va. 135, 128 S. E. 546, 549, 550; *Monticello Mineral Springs* v. *City of Richmond*, 147 Va. 355, 137 S. E. 458, 462; *Hannah* v. *City of Roanoke*, 148 Va. 554, 139 S. E. 303, 307; *Shirley* v. *Russell*, 149 Va. 658, 140 S. E. 816, 818; *Yeary* v. *Holbrook*, 171 Va. 266, 198 S. E. 441, 445, 446. See also *Shoemaker* v. *U. S.*, 147 U. S. 282, 304-306; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 558-560; *U. S.* v. *Wise*, 131 Fed. (2) 851, 853.

[6] *Ch. of Highway Com.* v. *Parker*, 147 Va. 25, 136 S. E. 496, 498; *Ch. of Highway Com.* v. *Fletcher*, 153 Va. 43, 149 S. E. 456, 457; *Long* v. *Shirley*, 177 Va. 401, 14 S. E. (2) 375, 379.

missioner, be condemned after the construction of the highway, as well as prior thereto * * *." The statute does not provide that the appellee's discretion shall in no wise limit the right of the owner to have his property viewed before its form has been changed. The words, "shall in no wise limit", shown in the statute, have reference to the amount of the deposit to be made by the appellee based upon his estimate of the "fair value of the land taken and damage done." The only limitation in regard to the appellee's control of the time for the view is that the view must be made in condemnation proceedings which must be instituted within sixty days "after the completion of the construction of such highway." That limitation does not prevent a false view because after the completion of the construction the form of the property is different, and the property must be viewed in that form.

There is no justification for construing the statute to mean that if the appellee delays the construction of the road for an unreasonable time the owner may apply for mandamus to compel the appellee to institute proceedings. After the decision in *Bailey* v. *Anderson*, 182 Va. 70, the statute was amended by a provision authorizing the owner to petition the Court for the appointment of commissioners, and authorizing the Court to appoint commissioners if it be found by the Court "that a reasonable time has elapsed for the completion of the construction of the highway project or that sixty days have elapsed since the completion of the construction of the highway project or that more than one year has elapsed since the Commissioner entered upon and took posession of the property, without condemnation proceedings being instituted * * *."[7] The owner would have the burden of proof; and while it would not be difficult to prove that a particular time had elapsed after entry

[7] Virginia Acts, 1944, chapter 381.

on the property it would be difficult to prove that a reasonable time had elapsed for the completion of the construction of the highway project.

It is not reasonable to suppose that the legislature intended simply to "clarify" the statute by the amendment. This controversy is governed, of course, by the statute before it was amended, since the mutilation was completed and the proceedings were instituted before the amendment. In the statute, before the 1944 amendment, the intention of the legislature is "revealed too distinctly" to permit the Court "to ignore it because of mere misgivings as to power."[8] The words "in the discretion of" (ante p. 18) are not ambiguous or technical. They are used frequently in legal parlance. The Court is not justified in drawing "on some unexpressed spirit outside the bounds of the normal meaning of words."[9] The normal meaning of these words is that the party having the discretionary power is in control. If an exception had been intended the general language, "in the discretion of," would not have been used. The presumption is that no exception was intended.[10] But let it be assumed that under the statute before amendment the Court would have been justified in appointing commissioners if the appellant had shown that a reasonable time had elapsed for the completion of the highway project, and let it be assumed that it would have been justifiable to place on the appellant that heavy burden of proof and that he would have been able to shoulder that burden during 1942 and 1943 when because of conditions

[8] *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379; *Hopkins Fed. S. & L. Association* v. *Cleary*, 296 U. S. 315, 335.

[9] *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617.

[10] Cf. *Chicago, etc. R. Co.* v. *Westby*, 178 Fed. 619; *Fed. Dep. Ins. Corp.* v. *Winton*, 131F(2) 780; *People* v. *Pacific Guano Co.*, 55 Cal. App. (2) 845, 132P(2) 254; *Kirby* v. *Board, etc.*, 129 Conn. 419, 29A(2) 452; *Bederski* v. *P. & F. Pen. Board, etc.*, 4 N. J. Misc. 637, 134A90, aff. 138 A. 918.

arising from the war highway construction was retarded, still that does not reach the question at issue here because the appellee was mutilating the property continuously and by the time the appellant had been able to prove that the appellee had failed to complete the highway in a reasonable time it would have been too late for the commissioners to view the property in its original condition.

The statute can not be construed to mean that if the owner objects to the mutilation and requests a view the appellee must cause the view to be made before the property is changed, or that if the owner presents his objection to the mutilation the Court may in its discretion require a view before the property is changed by the mutilation. Under the statute the appellee is absolutely free to cause the view to be made either before or after the mutilation, regardless of the owner's objections or requests, and the Court is powerless to prevent it. Therefore, the appellant was under no duty to apply to the Court for the appointment of commissioners to view the property before it was changed by the mutilation. The discretion bestowed by the statute upon the appellee plainly displaced the discretion of the Court in the appointment of commissioners to view the property, and the appellant did not have to make a useless request in order to be in a position to attack the statute.[11]

The fact that the appellant tried earnestly and persistently, but unsuccessfully, to prevent the appellee from mutilating the property is no ground for saying that the appellee rightfully mutilated and changed the form of the property before he allowed the commissioners to view it. That the appellant did not want the property mutilated does not prove that it was immaterial to the appellant whether the property was viewed before or after the mutilation. There is no relation whatsoever between the appellant's

[11] *Smith* v. *Cahoon*, 283 U. S. 553.

efforts to save the operation of his mill and the time for the view.

There is no necessity for injecting into the condemnation procedure an injurious impediment in the form of "administrative discretion" which has no relation to the needs of the appellee in the construction of highways. He does not need the power to control the time for the view in order to avoid interference with the construction of the highway. He does not need that power in order to commence construction before questions of title and compensation are settled or before proceedings are instituted. These are important matters in the construction of highways, but they can be accomplished without laying hands on the viewing procedure. (Cf. *City of Oakland* v. *U. S.*, 124 Fed. (2) 959.)

The phrase "in the discretion of" was in the original statute (Virginia Acts 1922, c. 403, section 10), and has never been removed by any of the amendatory acts (Acts 1924 c. 448; Acts 1928, c. 472; Acts 1934, c. 377; Acts 1940, c. 380). The statute was enacted in 1922 in accordance with the request of the State Highway Commissioner. His report in 1921 contained the following recommendation: "That some fair and equitable right of way law be enacted. This has been one of the most serious difficulties which has been met by this department. In many instances the values of properties, assessed at a few dollars per acre, have, under condemnation, increased from five hundred to fifteen hundred per cent." [12] In other words, the Commissioner complained, for example, that instead of being able to acquire farm land for $5.00 an acre, a value estimated by the assessors for tax purposes, he was confronted by prices asked by the farmers ranging from $55.00 to $155.00 an

[12] Published Report of State Highway Commissioner of Virginia for period of two years ending September 30, 1921, "Third" recommendation.

acre. Obviously the Commissioner was unreasonable in his desire to fix prices on the basis of values fixed by the tax assessors; and in expressing a desire for the enactment of a "right of way law" he envisaged a law that would be "fair and equitable" to the Commonwealth, a law that would enable him to meet the "serious difficulties" placed in his way by owners who thought their properties were worth more than the tax assessors had estimated. One can not read the Commissioner's recommendation without sensing his desire for a power in the "right of way law," the condemnation statute, by which he would have the advantage in his negotiations with owners so that he could keep prices close to the values fixed by the tax assessors. The answer to this recommendation was the enactment of the statute.

The desire of a state to acquire rights of way at low cost is no justification for placing an owner virtually at the mercy of the State Highway Commissioner in negotiations for a settlement. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." [13]

The coercive aspect of the appellee's discretionary power to mutilate the property and to set the time for the view is glaringly illustrated by his agent's warning to the appellant that if he refused to accept the sum of $2,000 offered as compensation and damages the property would be seized by the appellee, the highway would be constructed, and the appellant would be compelled by the statute to wait until sixty days after completion of the construction of the highway before he could have the amount of his compensation and damages determined. The appellant refused to consider this offer (R. 25, 26). The appellee carried out the

[13] *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, 416.

threat by seizure and mutilation, and by a delay until the mutilation was completed before instituting condemnation proceedings to have the property viewed by commissioners, a period of one year and eight months from the date of the seizure (R. 5, 6, 7). Although the appellee offered only $2,000, and deposited with the clerk only $1,500, the Senior Highway Engineer testified at the hearing that the amount should have been $3,000 (R. 16, 17, 18), the commissioners awarded $8,000 (R. 28, 29) which did not include damage to the mill as that was excluded by stipulation (R. 19, 20), and the appellant claimed approximately $25,000 (R. 4, 5; pars. 1 and 2 of plea) which included damage to the mill. The appellant was the only one who knew the property intimately before it was torn and disfigured by the appellee. Even assuming that his estimate was too high, still the award was over 400 per cent more than the amount deposited by the appellee when he seized the property, and the award did not include damage to the mill.

The appellee appropriately exercises discretion in matters of highway construction. His power, as well as the condemnation procedure, is "perverted from its proper function" (dissent in *Reed* v. *Allen*, 286 U. S. 191, 209) when his discretion is injected into matters relating to procedural due process and used to deny a fundamental right and to oppress one who is subjected to his control.

3. *Destruction of Material Evidence*

Acting under the statute assailed, the appellee withheld and destroyed evidence that was material and important in the determination of the amount to which the appellant was entitled. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."[14] No real opportunity to protect against an inadequate assess-

[14] *West Ohio Gas Co.* v. *P. U. Com.*, 294 U. S. 63, 69.

ment of the compensation and damages was afforded to the commissioners after they had viewed the property in its mutilated condition.[15] The disclosure was not "full and candid"[16] because the appellee, acting under the statute, made it impossible for the viewers to see without interference the original condition of the property.

The appellant would not be in a position to object to the view if the viewers had awarded him what he claimed, but the fact that the estimate of the appellee's witnesses was less than the amount awarded does not prove that the appellant received no injury from the view. Presumably the viewers were disinterested and qualified, since they were appointed by the Court without suggestion from the parties, but the appellee's witnesses were picked by him. The appellee filed exception to the award on the ground that it was higher than the estimate of his witnesses (R. 30-33). The Court overruled the exception (R. 34), and in effect held that the estimate of the appellee's witnesses was not to be taken as conclusive proof of the amount to which the appellant was entitled. No appeal was taken by the appellee. He is not in a position to claim now that the appellant was not injured by the view on the theory that the appellee's witnesses proved what the appellant was entitled to and the appellant was awarded more than that. Aside from that, the damage to the appellant lies in the falsity of the view, not in the extent of the discrepancy between the estimate of the appellee's witnesses and the amount of the award. The right to have assistance of counsel, "is too fundamental and absolute to allow courts to indulge in nice calculations

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[15] *Saunders* v. *Shaw*, 244 U. S. 317, 319; *Brinkerhoff-Farris T. & S. Co.* v. *Hill*, 281 U. S. 673, 682; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; *Snyder* v. *Mass.*, 291 U. S. 97, 116, 121; *Morgan* v. *U. S.*, 298 U. S. 468, 480, 481; *Ohio Bell Tel. Co.* v. *P. U. Com.*, 301 U. S. 292, 304, 305.

[16] *Roberts* v. *New York*, 295 U. S. 264, 278.

as to the amount of prejudice arising from its denial,"[17] and the same may be said of the right to have a fair view?

In *Snyder* v. *Massachusetts* (291 U. S. 97), if the gas pumps had been material items in Snyder's defense, and if the state had permitted the district attorney to remove the pumps from the scene before the jury made the view, undoubtedly the accused would have been deprived of a right "ranked as fundamental" (p. 105), even though the accused had been afforded every opportunity to introduce at the trial, after the view, evidence to show the condition of the premises before the removal of the pumps, and even though he had been convicted of manslaughter in spite of the state's evidence strongly indicating that he was guilty of murder, and even though there had been a wide discrepancy between the evidence for the state and the evidence for the defense. The right to a fair view is not less fundamental because it concerns property rather than life. Procedural fairness is not confined to criminal cases. In applying the constitutional security no valid distinction can be made between the withholding of evidence in a proceeding in which the owner is deprived of his property without his consent, and the withholding of evidence in a criminal case, particularly where, as in the Virginia condemnation procedure,[18] the determination of those to whom the evidence would have been submitted "exacts and receives a proper deference from courts."[19]

4. *Inappropriateness of Procedure*

The statute does not provide for the owner the procedure in regard to the viewing of the property that is appropriate to the Virginia method of determining the amount of the

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[17] *Glasser* v. *U. S.*, 315 U. S. 60, 76.

[18] See cases cited in note 5, *ante*.

[19] *Ohio Bell Tel. Co.* v. *P. U. Com.*, 301 U. S. 292, 304.

compensation and damages.[20] That the owner has no fundamental right to a view is no reason for requiring a view and then compelling the owner to take compensation and damages determined by a false view. Where the view is mandatory the owner has a fundamental right to fairness, which requires that an opportunity be afforded the owner to have a view before the property is changed to an inferior form. Where a view is not required in the system of condemnation, a view before mutilation is not fundamental because it bears only a "shadowy" relation to the determination of the compensation and damages. Where a view is mandatory in the system of condemnation, a view before mutilation is fundamental because the "inevitable effect" of the view is "that of evidence" and the view bears "relation, reasonably substantial, to the fullness of his opportunity" to establish the amount of the just compensation and damages to which the owner is entitled.[21] The procedure should be shaped so as to safeguard the fundamental right to a fair view where the view is mandatory in the system of condemnation, as it is in Virginia. Under the statute assailed the procedure is shaped "in absolute disregard of the owner's right to just compensation,"[22] contrary to the due process clause of the Fourteenth Amendment, in that the owner must wait until the original condition of his property, which is the very basis upon which the amount of the award is determined, has been completely removed by the appellee from the view of the commissioners appointed by the Court to view the land. Such a system of condemnation is not even "fair upon its face."[23]

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[20] *Davidson* v. *The Board of Administrators*, 96 U. S. 97, 105; *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 246.

[21] *Snyder* v. *Mass.*, 291 U. S. 97, 105, 106, 108, 121.

[22] *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363.

[23] *Roberts* v. *New York*, 295 U. S. 264, 277.

"A minimum requirement of due process, allowing for variations in method, is always that a procedure be afforded under which he whose property is to be taken shall be allowed to be heard; that the determination under which he is required to surrender it be reasonable, and that it be free from the opportunity for arbitrary power."[24]

II. Compensation for Use of Property

A. Due Process Clause of Fourteenth Amendment

The due process clause of the Fourteenth Amendment prohibits a state from taking and using private property without paying just compensation.[25] The appellant claimed compensation for the use of the property for highway purposes. The basis of the claim was that the use was unauthorized and illegal because it was based entirely upon the unconstitutional statute assailed (R. 5-8). The ruling denying compensation for use (R. 12) was not based upon an appraisal of the facts. It was not an application of the law to the facts. It was a ruling made necessary by the previous ruling that the statute does not violate the Fourteenth Amendment. If the Court had ruled that the claim for use was not a valid claim because the appellant had the use of the property or could have used the property at the same time the appellee was using it, that would have been a ruling based upon an appraisal of the facts. That the appellant has been deprived of the use of his property since October 15, 1941, is an undisputed fact. If the denial of compensation for use was based upon the

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[24] *Noyes* v. *Erie & Wyoming Farmers' Co-op. Corp.*, 10 N. Y. S.(2) 114, 123.

[25] *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 246; *A. Backus Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 565; *Appleby* v. *Buffalo*, 221 U. S. 524, 532; *McGovern* v. *New York*, 229 U. S. 363, 370; *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363, 365; *Dohaney* v. *Rogers*, 281 U. S. 362, 366; *Roberts* v. *New York*, 295 U. S. 264.

theory that the appellant's equity suit necessitated the use of the land for highway purposes before and after the condemnation proceedings were instituted, the denial was "gross and obvious" (*Roberts* v. *New York*, 295 U. S. 264, 277) because the condemnation proceedings were brought while the equity suit was pending and the proceedings were postponed by agreement until the equity suit was decided, and there was nothing in the agreement to show that the appellant acquiesced in the use or agreed that the use would be without compensation.

B. Relation of Title to Use

Without the owner's consent the state may acquire title and may use the property before acquiring title, but just compensation must be paid for the use.[26] That the sovereign may provide by statute for the passing of title, without the owner's consent, by filing a written declaration of taking before the property is used and before the entire compensation for the property is paid,[27] is no reason for saying that without a statute accomplishing that result the property may be used by the sovereign free of charge before the title is acquired by condemnation proceedings. The system of private property can not survive without a full recognition of the principle that in the absence of agreement the ownership of title determines the right to use property without having to pay for the use.

C. Measure of Compensation for Authorized Use

In *U. S.* v. *Rogers*, 257 Fed. 397, 400, where land was flooded pursuant to statute, the Court said: "When in the exercise of its sovereign power the government actually

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[26] *U. S.* v. *Rogers*, 255 U. S. 163; *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299.

[27] *City of Oakland* v. *U. S.*, 124 F. (2) 959.

appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise. Something of substance is lacking in an award that omits all consideration of the time of the prior actual taking. That would be obvious in the case of a completed office building, and the difference here is but in degree, not in principle."

In *U. S.* v. *Rogers*, 255 U. S. 163, 169, it is stated that "the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled." In *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299, it is said that compensation is "the full and perfect equivalent of the property taken"; that compensation "rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken"; that where the owner has been deprived of "the land and its use since the taking" he is entitled "to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added" (261 U. S. 299, 304, 306). In neither of these cases was there any question as to the validity of the authority by which the property was used before the title was acquired, and the decisions do not lay down the rule that where property is seized by an agent of the sovereign and used by the public without any authority interest is a "convenient and fair method" or a "good measure" for determining compensation for the use.

D. Measure of Compensation for Unauthorized Use

1. *Statement of Contention*

The appellant contends that since the use of his property without first acquiring title is based entirely upon the unconstitutional statute assailed, there was no more authority for the use than there would have been if the statute had not been enacted. He contends that in denying compensation for the unauthorized use of the property the Court deprived him of his property without due process of law in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

As compensation for the unauthorized use of the property, the appellant claimed compensation at the rate of $200.00 a month (R. 5), approximately $6.50 a day, and not merely interest at six per cent on $1,500.00, awarded for the value of the property, which would be only $7.50 a month, approximately twenty-five cents a day. For four years the appellant's property has been used illegally as a part of an important state highway. It would be a travesty of justice, as well as an inducement to lawless seizure of private property, to allow the state to use the property for the nominal sum of twenty-five cents a day. The appellant contends that failure to compensate him on the basis of the actual rental value of the property as a part of a state highway would deprive him of his property without due process of law contrary to the Fourteenth Amendment; but whether that be so or not, he contends that if the statute assailed is declared unconstitutional his right to recover the actual rental value of the use is based upon equitable principles which have been fully recognized by the highest Court in Virginia.

2. *Claim for Just Compensation*

The appellant's right to be compensated for the unauthorized use of the property by the state is not based upon a tort of the appellee committed while acting outside the scope of his authority because the wrongful character of his seizure derives from the statute upon which the seizure was based.[28] The Commonwealth of Virginia has enjoyed the benefit of the use of appellant's property for state highway purposes without paying anything for it,[29] and the use has been accomplished through the operation of the unconstitutional statute, not through the presumptuous act of the appellee. Whether the appellant has a cause of action against the appellee in his individual capacity because of the damage inflicted by his mutilations while acting under the authority of the unconstitutional statute is a question not related to the just compensation for the use of the property by the Commonwealth as a public highway.

This is not a case in which a tort has been waived and a claim made against the state.[30] It was not necessary to resort to the statutory procedure for presenting claims against the state, as provided in Virginia Code 1942, section 2578, because the appellant's claim is for just compensation in a proceeding brought by the state. The sovereign may deny liability or may restrict the procedure for enforcing liability, but it can not prevent an owner from claiming just compensation for the unauthorized public use of his land without infringing the Fourteenth Amend-

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[28] See *Wilson* v. *State Highway Com'r.*, 174 Va. 82; *Sayers* v. *Butlar*, 180 Va. 222. Cf. *Home Telephone, etc., Co.* v. *Los Angeles*, 227 U. S. 278; *U. S.* v. *N. A. T. & T. Co.*, 253 U. S. 330, 333; *U. S.* v. *Classic*, 313 U. S. 299, 325, 326.

[29] See *Nelson County* v. *Coleman*, 126 Va. 275; *United States* v. *Creek Nation*, 295 U. S. 103, 108.

[30] *Com.* v. *Chilton Malting Co.*, 154 Va. 28.

ment.[31] It would not be due process for the state to provide that title by eminent domain shall be acquired through proceedings in the county where the land lies but that the compensation shall not be considered in the proceedings, leaving the owner to seek compensation by a special action on his own motion under section 2578 of the Code, which requires claims to be presented at Richmond.

If the statute assailed had not been enacted and the state had used the land for a public highway without bringing action to acquire title the appellant would have had a remedy by mandamus to compel the appellee to institute proceedings to determine just compensation for the use of the land, and that would have been his only remedy.[32] Since the appellee brought the proceedings as the agent of the state, the appellant had the right to present in the proceedings his claim for just compensation for the use of the land.

Liability for the value of the highway use does not change the nature of the obligation. It is still just compensation, and must be recovered in condemnation proceedings. In *Carter v. Town of Pearisburg*, 173 Va. 346, the Court said that to deny compensation for use would be a denial of just compensation. If the owner in that case had waited until the condemnation suit had been instituted and had then claimed compensation for the rental value of the property, it is inconceivable that the Court would have said that while the claim was for just compensation it could not be presented in a suit brought by the town to establish just compensation for the land taken. That case, of course, did not involve a claim against the state, but it is sufficient authority for treating the use claim as a claim for just com-

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[31] Cf. *Seaboard Air Line R. Co. v. U. S.*, 261 U. S. 299, 306.

[32] *Wilson v. State Highway Com'r.*, 174 Va. 82; *Hicks v. Anderson*, 182 Va. 195.

pensation, and the latter may be presented in condemnation proceedings.

3. *Compensation for Rental Value Instead of Interest*

Where public use is made of private property without authority and without the owner's consent prior to acquisition of title, just compensation for the use is measured by the actual rental value of the property used, not by interest on the amount awarded for the value of the property in subsequent proceedings. With respect to the remedies for the redress of unauthorized use of private property there is no difference between acts committed under color of eminent domain and those committed without color of that power.[33]

Due process requires that unauthorized seizures of private property be differentiated from those that are authorized by valid statute, regulation or Court order. Without that distinction due process would present no obstacle to governmental encroachments. In highway construction, there would be no incentive for controlling by statute or Court order the authority of highway officials to take possession because control is exerted to protect the owner, not to facilitate the construction of highways. Due respect for ordered liberty demands a rule designed to prevent the wresting of private property by oppressive state action. The due process security of the Fourteenth Amendment is not less potent than the just compensation mandate of the Fifth Amendment in preventing the application of a rule for measuring compensation that would lead to oppressive deprivations in the exercise of eminent domain.[34] If the payment of interest is the only consequence of the unauthorized use of private property for public purposes, state

[33] *Lewis on Eminent Domain*, 3rd edition, section 953.

[34] Cf. *U. S. v. General Motors Corp.*, 323 U. S. 373.

officials, railroads, and others may romp at will over private lands merely because they have the power to acquire title by eminent domain. The Court has said that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."[35]

In *Evelyn Bldg. Corp.* v. *City of New York*, 257 N. Y. 501, a rock slide occurred during excavations for a subway. Without the owner's consent, and without statutory authority, piers were constructed on the abutting property in order to secure the work and safeguard the subway structure as completed. The trial court treated the case as one to condemn an easement and awarded damages on that basis, treating the city as the owner from the time of entry, and refused to consider the claim of the plaintiff that he had been deprived of the use of the property. The Court of Appeals, by unanimous decision in which Chief Judge Cardozo participated, held that the plaintiff was entitled to recover "his loss, if any, because of deprivation of the use of his land up to the time of the trial," and the Court said that it was error for the trial court "to treat the city as owner from the date of the slide" (257 N. Y. 501, 510). The Court did not say or imply that interest would be the only amount that the owner could recover.

In *Fletcher* v. *Delaware L. & W. R. Co.*, 79 Fed. (2) 306, the railroad company maintained tracks across private property without the owner's consent, claiming that it had an easement over the land derived from a permit issued by the state. The Court held that the permit was revoked when the state sold the land and that the owner was entitled to recover damages for loss of rentals and damages for the value of the easement, and that upon payment of

[35] *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324.

the latter the owner should convey the easement to the railroad. See also, *Hustead* v. *Barron*, 75 Fed. (2) 169, 170, which recognizes the same principles.

In *Carter* v. *Town of Pearisburg*, 173 Va. 346, the town had for many years been obtaining a portion of its water supply from springs located on private property, the water being piped across the property free of charge with the owner's consent. On November 2, 1936, the owner notified the town that on a given date there would be a monthly rental charge for the use of the property. The town continued to use the property without paying the monthly rental charge, and the owner brought an action to recover possession. The town filed a bill to enjoin the owner's suit and his interference with the use of the property, and claimed ownership by gift, prescription or estoppel. The claim of the town was denied by the lower Court. The town then acquired title by condemnation proceedings. The Supreme Court of Appeals of Virginia held that "when it had been judicially determined that the town's right to use the water and lands terminated on November 2, 1936, it necessarily followed that the owners of the property were entitled to a fair rental for such use after that date. To hold otherwise would amount to depriving these owners of their property without due process of law and appropriating it to public use without just compensation in violation of their constitutional rights. (Constitution of Virginia, Section 11, 6.)" (173 Va. 346, 350.) The Court held that the owners were entitled to recover "rental for the use of their property from the date of the revocation of the permissive use thereof, November 2, 1936, to the date when it is admitted that the appellee acquired title to such property by condemnation, April 29, 1938, at the rate of $50 per month, with interest and costs." (173 Va. 346, 351.) It is not shown what the award was for the value of the land taken for the pipe line and for the easement in the springs, but

evidently it was small because the town objected to paying $50 a month in view of the small amount awarded for the value of the land. It did not require a wide strip of land for the pipe line, and if the pipe was under ground the owner could still make use of the land. While the award had some bearing upon the value of the use it was not controlling and it is indicated that interest on that amount would have been far below $50 a month allowed for the rental value of the land. The owner's demand of that amount was not controlling because if it had been the amount awarded for the land and the question of due process would have been immaterial.[36]

"There are two instances of Congressional ratification of takings which turned tortious acts into the exercise of the power of eminent domain and placed upon the Government the duty to make 'just compensation,' including sums in the nature of interest. These are United States v. Creek Nation and Shoshone Tribe v. United States." (*U. S.* v. *Goltra*, 312 U. S. 203, 208, 209.)

In the *Creek Nation* case, 295 U. S. 103, no claim was made for the rental value of the land used. The claimant was satisfied with an additional amount representing interest on the value of the claimant's rights in the lands to which the United States had title. The Court upheld the claim for interest in the following words: "Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added" (295 U. S. 103, 111). The Court did not say that interest was a "fair method", as stated in *U. S.* v. *Rogers, supra*, or a "good measure", as stated in *Seaboard Air Line R. Co.* v. *United States, supra*. Apparently the Court felt that while interest might not be a fair or a good measure it was a suitable measure if the claimant was satis-

[36] That the owner can not establish the compensation by simply demanding a certain amount, see *Galveston Wharf Co.* v. *Gulf C. & S. F. R. Co.*, 72 Texas 454, 10 S. W. 537.

fied with it. That the claimant was satisfied with interest is evident, and the reason apparently was that it would have been difficult to determine the value of the use made of the lands since they were divided into tracts and conveyed to various patentees. It was difficult, no doubt, to assess the value of the rights in the lands. When the case was presented again after the second award the Court stated that a "fair approximation or average of values may be adopted * * *" (302 U. S. 620, 622). Because of the peculiar conditions in this case, the decision does not lay down the rule that where the use is illegal the owner is confined to interest on the amount awarded for the land taken.

In *Shoshone Tribe* v. *United States*, 299 U. S. 476, the claimant was satisfied with interest, and did not make any claim for an assessment of the value of the use on any other basis. By agreement the claim was for interest at 7% (see agreement of parties), which obviously was more advantageous to the claimant than the rental value of all the different tracts taken by the hostile Indian tribe over a period of years, beginning in 1878 (299 U. S. 476, 494, 495). That the compensation for illegal use may be assessed on a different basis, if the owner desires it and if it is practicable, is clearly shown by the following statement of the Court: "The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances" (299 U. S. 476, 496).

—In the light of all the circumstances; the rental value is a suitable standard by which to measure the increment to complete the just compensation to which the appellant is entitled. In the appellant's plea he claimed interest on the amount to be awarded as compensation and damages (R. 5), but after the commissioners awarded $6,500.00 as damages

and only $1,500.00 as compensation for the value of the land taken (R. 28, 29) the appellant waived interest on the latter amount (R. 35) and thereby elected to stand on his claim (R. 5) for compensation based upon the rental value of the land taken for highway purposes. The appellee did not object to the form of the appellant's plea or to the appellant's course in waiting until he knew what the amount of the award would be for compensation and damages before he elected to stand on his claim based upon rental value rather than interest. No harm was done by the appellant's course and election, since neither the matter of interest nor the question of compensation for use was submitted to the commissioners. This is shown by the recital in the report of the commissioners "that, for the fee simple title * * * the sum of $1,500.00 will be a just compensation" (R. 28, 29). There is nothing to indicate in the slightest degree that they ascertained the entire just compensation to which the appellant was entitled according to the facts in the case. (See *Moll* v. *Sanitary Dist. of Chicago*, 228 Ill. 633, 81 N. E. 1147, 1148.)

Since the use was illegal, the appellee should not be permitted to elect to pay interest, amounting to only twenty-five cents a day.

4. *Compensation for Rental Value for Highway Purposes*

If the appellee, in his official capacity, had been a trespasser acting under the unconstitutional statute by mistake or in good faith believing that he had the right to use the land, and without any warning to the contrary, the appellant's recovery would have been restricted to the rental value of the land for farming or residential purposes,[37] which would have been less than the rental value of the

[37] *Galveston Wharf Co.* v. *Gulf C. & S. F. R. Co.*, 72 Texas 452, 10 S. W. 537, 539; 63 C. J. pp. 1052, 1053, sections 253, 254.

property improved as a highway. The appellant contends that the appellee, acting in his official capacity, was a trespasser of the opposite type, acting willfully and being conscious of the violation of the appellant's rights. He paid no attention to the warnings confronting him, and acted at his peril. Acting under the unconstitutional statute, the appellee deliberately seized the land and used it for highway purposes in the face of two decisions of the highest Court in the sister State of West Virginia denouncing the same statutory procedure,[38] and in the face of the appellant's equity suit in which the statute was attacked. The trespass upon the appellant's land is not less wilful because the legislature, in enacting the statute assailed, authorized the use of the land in ignorance of the requirements of due process, or because the appellee may have had advice from the Attorney General that in spite of the decision in *Bragg* v. *Weaver*, 251 U. S. 57, and the two *West Virginia* cases, the appellee had the right to ignore the appellant's objections to the use of the property under the statute and to proceed with the mutilation and restraint, or because the appellee was ignorant of the legal objections interposed.[39]

The appellant had no power to prevent the appellee from acquiring the title. The appellant sought to prevent the destruction of the operation of his mill, not to prevent the filing of condemnation proceedings. If the appellee had been acting in good faith he would have brought the condemnation proceedings immediately after the appellant filed his equity suit. That would have enabled the state to acquire the title to the land and to use it as state property. It would have put an end to the appellant's constitutional

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[38] *McGibson* v. *Roane County Court*, 95 W. Va. 338; *Simms* v. *Dillon*, 119 W. Va. 284.

[39] *Guffey* v. *Smith*, 237 U. S. 101; *Union Naval Stores Co.* v. *United States*, 240 U. S. 284.

objections to the statute. It would have enabled the viewers to see the property in its original condition. It would have settled the mill question because in order to avoid the payment of damages for the injury to the mill operations the appellee would have agreed to keep the water flowing to the mill, since that is what he agreed to do in the condemnation proceedings which he finally brought. There is no basis for the belief that the appellee seized the land, fully intending to institute condemnation proceedings within a reasonable time after the seizure and before the land was seriously mutilated so that the appellant would have a fair opportunity to show the viewers the land in its original condition. The property was mutilated and used for highway purposes, and the appellant was placed under the restraint imposed by the statute, for one year and eight months before the appellee instituted the proceedings (R. 5-7). It is clear that the proceedings were instituted to establish a basis for the decision in the equity suit that the appellant had a "prompt remedy" and could not attack the statute (R. 36, 37, No. 829). There is no ground for contending that the proceedings were not instituted earlier because of the appellant's interference. The appellant was the victim of the deliberate use of the oppressive power which the legislature created and placed in the hands of the appellee. If the appellee contends that the condemnation proceedings were instituted merely because the highway had been completed, without any thought of defeating the appellant's attack on the statute, then it is fair to have him state the date of the completion of the highway, and whether the completion was before or after March 5, 1943, when the appeal in the equity suit was granted (R. 21, No. 829), and he should explain why the proceedings were instituted on June 17, 1943 (R. 1), and whether the selection of that date for instituting the proceedings had any reference to the fact that the appeal in the equity suit was placed on the docket

for the June session of the Court, which began on June 7, 1943.

In the equity suit the Court did not find that the property was used for highway purposes in good faith. It found that the appellee was not arbitrary in his selection of the new highway course (R. 34, No. 829), that the appellant had a "prompt remedy" (R. 37, No. 829), and that it was unnecessary to consider the statute under which the land was used (R. 36, No. 829), but the Court did not discuss or mention the appellee' good faith or bad faith in devoting the land to state highway purposes in the right of the warnings he had and of the circumstances under which he instituted the proceedings and prevented the statute from being considered. The Court did not discuss or consider the use.

The appellant contends that when a state official has ample opportunity to satisfy the owner's fundamental rights and simultaneously to proceed with the public use of the land, and then willfully ignores the opportunity, uses the land for the state relying upon palpably illegal legislative authority, and by artificial means convinces the Court that the owner has no right to attack his authority, the state should pay the owner just compensation for the use of the land in accordance with the rule of justice that allows full return of the actual benefit derived from the use, represented by the fair rental value of the use of the property in its improved condition, rather than in accordance with some rule of convenience that allows only a nominal recovery not related to the improved use of the property.[40]

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[40] *Kester* v. *Bostwick*, 153 Fla. 437, 15 S. (2) 201, 205, 207, where the Court, referring to the "red lights" confronting the defendant, said: Defendant saw them and ran over every one of them. He took a chance and lost • • •." *Martin* v. *Smith*, 214 Minn. 9, 7 N. W. (2) 481; *Gilley* v. *Williams*, 43 S. W. (Texas Civ. App.) 1094, writ denied by

If payment of the rental value of the use of the property as a highway constitutes a part of the just compensation arising from the acts of the appellee acting within the scope of the authority intended by the legislature, the payment can not be avoided on the ground that the obligation is based upon a tort committed by the state's agent for which the state has not consented to be liable, because the payment of just compensation is a fundamental obligation which the state can not escape. A state may deny or accept liability for the torts of its agents, but it does not have that choice with respect to liability for just compensation [41] even though the right to just compensation derives from the tort. The right to just compensation does not depend upon principles of agency, but liability based upon principles of agency does not displace the right to just compensation. As the Court stated in *Wilson* v. *State Highway Commissioner*, 174 Va. 82, the appellee's "official relationship, as an agent, would fix liability, if any there be, upon his principal, the State" (p. 89), but the Court pointed out that the liability is enforced by condemnation proceedings (p. 93). For a willful tort of an agent, acting within the scope of his authority, an individual principal is liable, of course, even though he receives no benefit from

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Supreme Court of Texas; see also *Little Rock* v. *Jeuryens*, 133 Ark. 126, 202 S. W. 45, and *Winn* v. *Raney*, 153 Ga. 641, 113 S. E. 8; compare *Quality Excelsior Coal Co.* v. *Reeves*, 177 S. W. (2) (Ark.) 728, 731, 732, and *Lindberg* v. *Linder*, 133 Cal. App. 213, 23 P. (2) 842. As to owner's option, see *Hines* v. *I. N. S. Co.*, 101 Miss. 802, 58 S. 650, 651, and *Irwin* v. *McElroy*, 91 Ore. 232, 178 P. 791, 792. *Searl* v. *School Dist. No. 2, etc.*, 133 U. S. 553, is distinguishable because the district acquired possession before the owner acquired his interest, and there was no evidence of oppressive or disingenuous conduct or of disregard of an opportunity to avoid the result; also the owner claimed the value of the entire improvement, not merely the value of the use. The point is discussed in 28 C. J. S., p. 1036; 63 C. J., p. 1056, sec. 257.

[41] *Jacobs* v. *United States*, 290 U. S. 13.

the agent's act,[42] but to make the state liable for just compensation it is necessary to show that the state accepted a benefit, or that the damage was done in the furtherance of a public purpose.[43] The appellee acted within the scope of his statutory authority when he seized and used the land for state purposes. When he arbitrarily and willfully postponed the filing of condemnation proceedings for one year and eight months, and mutilated the property in the meantime, and when by filing the condemnation proceedings he thwarted the appellant's attack on the statute; he was acting in the furtherance of his service to the state, as contemplated by the statute, and he was using the means and methods contemplated by the legislature or necessarily resulting from the operation of the statute.[44] There could be no doubt of the sovereign obligation to pay just compensation for the use of the property as a highway if the legislature, believing it to be in the public interest to acquire lands for highways at low cost, had expressly authorized the appellee to seize, mutilate, and withhold the viewing of the property of those who refused to accept the amount offered by the appellee as compensation for the land taken and damages to the residue.[45] That the legislature would never express the purpose so boldly is no reason for allowing the state to escape when it authorizes the act by implication, or facilitates the accomplishment of the act. Of the three main elements of condemnation, viz., possession, compensation, and title, the statutory power of the appellee to control the filing of the proceed-

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[42] *Jeff. Stand. L. I. Co. v. Hedrick*, 181 Va. 824, 27 S. E. (2) 198, 202.

[43] *Wilson* v. *State High. Com'r.*, 174 Va. 82.

[44] Mecham, Outline of the Law of Agency (3rd ed.), sections 499-528.

[45] "The purpose • • • is shown in the enactment • • • and is about to be carried into effect by her officers acting in her name and at her command. The state is the principal and the action of her officers rightly may be imputed to her, even though a suit for injunction might lie against them." *Penn.* v. *W. Va.*, 262 U. S. 553, 591.

ings applies solely to the second element. Possession can be acquired without postponing the filing of proceedings. There is no point in postponing the filing of proceedings in the acquisition of the naked legal title. By controlling the time for filing the proceedings the state has a decided advantage in negotiating with the owner for a settlement on terms framed by the appellee. That the legislature when it passed the statute had before it the strong recommendation of the State Highway Commissioner that a statute should be enacted to make it possible to bring down the excessive demands of property owners, whose valuations greatly exceeded those of the tax assessors, shows that the control of the filing of the proceedings was given to the Commissioner by the legislature to carry out his desire to have a better bargaining position in making settlements with owners. The control was not given to him without any definite purpose in mind, and the purpose has no relation to anything whatever except the compensation. The control is the mainspring of the statute, and it has remained untouched since 1922 except for the mild limitations placed upon it in 1944 after the decision in the equity suit (*Bailey* v. *Anderson*, 182 Va. 70).[46] In seizing, mutilating and using the appellant's property and in postponing the filing of proceedings until the property had been radically changed, the appellee did what the legislature told him was "lawful and proper" to do.[47] In fact, if the legislature had not told him he could do it, clearly it would have been wrongful, unlawful, and improper. The point is, however, that the statute authorizing him to do it was wrongful, unlawful, improper, and in violation of the Fourteenth Amendment. It conferred power "which in the natural and ordinary course may involve the use

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[46] See R. 26, 30, ante.

[47] *Wilson* v. *State Highway Com'r.*, 174 Va. 82, 92, 93; 3 C. J. S., pp. 186, et seq.

of force upon third persons," and it committed to the appellee "the determination of the particular occasion upon which such force is to be used and the particular degree of force which is to be applied."[48]

The Commonwealth has derived a benefit not only from the use of the property but also from the appellee's artificial avoidance of the attack on the statute. The decision in *Bailey* v. *Anderson*, 182 Va. 70, operated to keep the statute intact until the legislature could amend it.[49] The Commonwealth has displayed its reluctance to relinquish the control vested in the appellee, which proves that the legislature considers the control to be very important in the acquisition of land for highways, and the importance derives from the benefit which the state, not the appellee personally, expects to receive from the control. No effort has been made by the Commonwealth to alleviate the harm which that control has imposed upon the appellant. His rights have been completely ignored, his property has been deliberately used for nearly four years as a state highway, the Commonwealth has not paid for the use, and it does not intend to do so.

The appellant does not make the "unpleasant suggestion" (*Cohens* v. *Virginia*, 6 Wheat. 264, 416) that the state was prompted by impure motives, which can not be imputed to the sovereign. He does not deny that the state's desire to reduce the cost of acquisitions is commendable. He does not contend, of course, that the several branches of the state government conspired to thwart the appellant's rights derived from the Constitution of the United States, but he contends that their separate acts have had that effect, as evidenced by the dangerous instrumentality entrusted by the legislature to the appellee, his willful use of it in refer-

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[48] Mecham, Outlines of Agency (3rd ed.), section 545.

[49] See page 26, *ante*.

ence to the appellant's property, the Attorney General's strategy in protecting it, the Court's acceptance of his argument without analysis, and finally the Court's decision, without analysis or discussion, upholding the statute which created the power as against the claim that it violates the Fourteenth Amendment. The appellant contends that these several acts disclose a strict and jealous regard for state policy and also a conscious and shocking disregard of federal rights which clash with that policy.[50] In the face of this showing, a denial of compensation for the rental value of the property for highway purposes on grounds of sovereign immunity "runs counter to modern democratic notions of the moral responsibility of the State."[51]

As stated in *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299, 304, just compensation "rests on equitable principles." The use there was not illegal, but it seems reasonable to interpret that expression as meaning that all compensation measured by equitable principles is included in just compensation. If the appellant had used the property of the state illegally and willfully, he would have had to pay for it in accordance with the rules governing willful trespass.[52] It would not be equitable to deny the owner a similar remedy when the state is the trespasser. To allow the state to mask behind the doctrine of sovereign immunity would be placing the emphasis upon common law principles. The realistic view is that "in equitable matters, in the absence of some statutory or constitutional provision to the contrary, the general principles of equity should be applied to actions brought by the state as well as by a private party" in order to prevent "unjust enrichment."[53]

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[50] See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264; *Poindexter* v. *Greenhow*, 114 U. S. 270.

[51] *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 59 (dissent).

[52] *Union Nav. Stores Co.* v. *U. S.*, 240 U. S. 284.

[53] *State* v. *Martin*, 59 Ariz. 438, 447; *Page* v. *City of Prescott*, 59 Ariz. 497.

The principles upon which the due process clause is founded are not less equitable than those supporting the right to just compensation. If the Fourteenth Amendment imposes the duty to pay the fair rental value of the illegal use of the land for a highway, a promise to pay that rental value is implied. The compensation based upon that duty and implied promise is a part of the just compensation to which the appellant is entitled.[54]

In *Carter* v. *Town of Pearisburg*, 173 Va. 346, compensation was not measured by the use to which the owner devoted the land. It does not appear that the land or the springs had a market value based upon the use of the water and the use of the land for a pipe line. Apparently the needs of the town afforded the only opportunity for the use of the water in great quantity, just as the needs of the state constituted the only opportunity for the use of the appellant's property as an important highway. The owner was allowed a "fair rental" not only for the use of the water but also for the use of the pipe line which the town had constructed at its own expense. The allowance was not based upon his demand of $50 a month. It was granted because a denial of a "fair rental" for the town's purposes would have deprived the owner of the property "without due process of law", and would have been a taking for public use "without just compensation." (173 Va. 346, 350) The demand for payment simply showed the willful character of the trespass because the town ignored the demand and continued to use the water and the pipe line without paying for it. If the owner had protested against the use of the pipe line and the water, without mentioning the amount he expected to get for the use, his right to a "fair rental" would have been the same.

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[54] *Jacobs* v. *U. S.*, 290 U. S. 13, 16.

The recovery in *Carter v. Town of Pearisburg*, 173 Va. 346, was accomplished in an action for possession brought by the owner, but since the Court recognized that the owner's right to a fair rental was founded upon the securities of due process and just compensation it is inconceivable that the owner would have been denied compensation for the rental value if he had protested and waited to present his claim in the condemnation proceedings brought by the town. If the State Highway Commissioner of Virginia had constructed and used the pipe line in defiance of the owner's protest, the owner would have been compelled to present his claim in condemnation proceedings.[55]

If the Court concludes that compensation for the fair rental value of the appellant's property for highway purposes is not a question of just compensation envisaged by the Fourteenth Amendment, but is one of state liability for a willful tort of its agent, and is unwilling to recognize that liability in this case either because of the belief that the tort was not authorized by the state expressly or by implication, or because the state is not liable even if it did authorize it, or accepted the benefits derived from it, unless it consents to be liable, or if the Court concludes that while it is a question of just compensation the denial of the claim was not "gross and obvious, coming close to the boundary of arbitrary action,"[56] still the question concerning the validity of the statute assailed will not become moot because if the statute is invalid the use is illegal

[55] *Wilson* v. *State Highway Com'r.*, 174 Va. 82, 93; *Hicks* v. *Anderson*, 182 Va. 195, 199. The statement in *Searl* v. *School District No. 2, etc.*, 133 U. S. 553, 565, to the effect that the claim for compensation for the use of the property should not be presented in the condemnation proceedings, is not controlling because *Carter* v. *Town of Pearisburg, supra*, recognizes that the claim is for just compensation, and the dictum in the *Searl* case does not mean that a claim for just compensation can not be presented in the condemnation proceedings.

[56] *Roberts* v. *New York*, 295 U. S. 264, 277.

for lack of authority, and the decision in *Carter* v. *Town of Pearisburg* (*supra*) is controlling and sufficient for the recovery of the rental value of the use for state purposes. The appellant needs primarily a decision that the statute assailed contravenes the Fourteenth Amendment of the Constitution of the United States and furnished no legal justification for the use of the property, and that the appellant is not prevented by any rule of justice from claiming compensation for the use. The appellant will then be allowed, under the decisions of the Supreme Court of Appeals of Virginia, to recover just compensation for the rental value of the use for highway purposes,[57] and to present his claim therefor in the condemnation proceedings brought by the state.[58]

5. *Doctrine of void ab initio*

The appellant relies upon the principle that an unconstitutional statute is void ab initio, as decided in *Norton* v. *Shelby County*, 118 U. S. 425, and enunciated in the familiar words (p. 442) of the Court: "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed." While this statement was reviewed with a critical eye in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374, the appellant contends that the principle of res judicata was controlling there, and that the doctrine of void ab initio was not repudiated or impaired. It is not contended that every act based upon an unconstitutional statute is without legal support, but it is contended that the unconstitutional statute does not furnish any support

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[57] *Carter* v. *Town of Pearisburg*, *supra*.

[58] *Wilson* v. *State Highway Com'r.*, *supra*.

and that the support, if any, is derived from some distinct rule of justice.

The appellant contends that the rule that an unconstitutional statute is void ab initio is a corollary of the American doctrine that the determination of the constitutional validity of a statute is a judicial function, not a legislative prerogative. To be valid until declared by the Court to be invalid, an unconstitutional statute must draw its temporary validity from a concurrent legislative power to determine constitutional validity. In this country the power authoritatively to determine whether a statute is constitutional has never been considered to be a concurrent power exercised initially by the enacting body and finally by the judiciary.[59] The controversy over the control of constitutional construction has been between the contenders for judicial supremacy and the contenders for legislative supremacy, with no middle ground.[60] That an unconstitutional statute may escape invalidation[61] indicates an infirmity in the judicial process by which constitutional validity is determined, but

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[59] Compare the early practice in New York, Pennsylvania, and Vermont where legislative construction was reviewed by Council, without absolute control. Haines, The American Doctrine of Judicial Supremacy (1932), pp. 73-87. A similar plan was proposed by Jefferson for Virginia (ibid., p. 87) and by Randolph and Madison for the national government (ibid., pp. 127-131).

[60] *Marbury* v. *Madison*, 1 Cranch 137, 177, 178, 179; *Loan Association* v. *Topeka*, 87 U. S. (20 Wall.) 655, 663, 664, 665; *U. S.* v. *Reese*, 92 U. S. 214, 221; *Munn* v. *Illinois*, 94 U. S. 113, 132, 133; *Granger Cases*, 94 U. S. 155, 164; *Gordon* v. *U. S.*, 117 U. S. 697; *Chicago, M. & St. P. R. Co.* v. *Minn.*, 134 U. S. 418, 459-466; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 554; *Atkins* v. *Kansas*, 191 U. S. 207, 223; *Lochner* v. *New York*, 198 U. S. 45, 57, 70, 72, 73, 75, 76; *Employers' Liability Cases*, 207 U. S. 463, 509, 510, 511, 537 (dissent); *Hammer* v. *Dagenhart*, 247 U. S. 251, 280 (dissent); *Burns Baking Co.* v. *Bryan*, 264 U. S. 465, 533, 534 (dissent); *Tyson and Brother* v. *Banton*, 273 U. S. 418, 445, 446, 454 (dissents); *Baldwin* v. *Missouri*, 281 U. S. 586, 595 (dissent); *Fed. Power Com.* v. *Nat. Gas Pipeline Co.*, 315 U. S. 575, 600, 601 (dissents).

[61] See note on "Unconstitutional legislation in the States of America," Journal Comp. Leg. & Int. Law (Nov. 1944), 26:74.

it is not proof of a concurrent legislative power to determine constitutional validity. When presented for judicial review a statute may withstand an attack because the Court finds it unnecessary to determine the validity of the statute, or indulges in the presumption of validity, or construes the statute so as to sustain it, or yields to the legislative determination of conditions justifying the enactment, but the Court never yields to a legislative determination of the constitutional validity of a statute that is declared by the Court to be unconstitutional.

An unconstitutional statute has always been considered to be void,[62] and since the doctrine of judicial supremacy excludes legislative control of constitutional construction the term "void" must signify invalidity from the date of enactment. In *Minge* v. *Gilman*, Fed. Cases, No. 9631, Mr. Justice Iredell stated that the constitution is "unrepealable and uncontrollable" by the legislature, that an unconstitutional statute is "totally void," and that the courts must declare it to be void "because passed without any authority whatever." (17 Fed. Cases 440, 442, 444). In *Whittington* v. *Polk*, 1 H. & J. (Md.) 236, Chief Justice Chase said that it was the function of the Court to determine whether a statute, "which assumes the appearance of law, and is clothed with the garb of authority," is constitutional; and that if unconstitutional "it is not the law, and cannot influence the judgment of the Court in the decision of the

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[62] Haines, American Doctrine of Judicial Supremacy (1932), pp. 33, 50, 51-63, 95-98, 105-120, 135-143, 148-, 93, giving the views of Coke, Otis, Mason, Varnum, Iredell, Marshall, Wilson, Ellsworth, Hamilton and others. See also *Minge* v. *Gilman*, Fed. Cases No. 9631; *Whittington* v. *Polk*, 1 H. & J. (Md.) 236; *Ogden* v. *Witherspoon*, Fed. Cases No. 10,461; *Marbury* v. *Madison*, 1 Cranch 127, 179; *Loan Assoc.* v. *Topeka*, 87 U. S. 655, 663; *Munn* v. *Illinois*, 94 U. S. 113, 132; *Poindexter* v. *Greenhow*, 114 U. S. 270, 295, 305; *Gordon* v. *U. S.*, 117 U. S. 697, 705; *Pollock* v. *Farmers Loan and Trust Co.*, 157 U. S. 429, 554, *Employers' Liability Cases*, 207 U. S. 463, 509 (dissent); *Ex parte Young*, 209 U. S. 123, 159; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 91.

question before them." (pp. 242, 244) In *Ogden* v. *Witherspoon*, Fed. Cases No. 10,461, Chief Justice Marshall stated that a legislative determination that an act had not been repealed was made "by a branch of government, not authorized by the constitution to make it, and is therefore, in my judgment, void." (18 Fed. Cases 618, 619) In *Marbury* v. *Madison*, 1 Cranch. 137, when the Chief Justice used the words "entirely void" (p. 177) he must have meant invalidity from the date of enactment because of the absence of legislative authority to put a binding construction upon the constitution. Since the terms "void" and "voidable" are opposite in meaning,[63] it is not reasonable to say that when a statute is termed "void" the meaning is that it is voidable. Occasionally "void" is intended to mean "voidable", where invalidity must be established by showing the absence of particular facts,[64] but in *Marbury* v. *Madison* the statute was held invalid because of the absence of power.

While an unconstitutional statute may escape judicial review until it injures someone who is able and willing to assail it, the assailant can not escape the rules of justice which confront him in a lawsuit. Constitutional questions do not displace the rules by which litigated issues are resolved. In deciding whether to protect or to expose acts done under an unconstitutional statute, the Court is guided by "those flexible considerations of equity which are established sources for judicial law-making,"[65] and which are not related necessarily to the constitutional grounds upon which the statute is assailed. In striking down an unconstitutional statute, the Court exposes the acts done under it because they are not supported by equitable principles. An uncon-

[63] *Toy Toy* v. *Hopkins*, 212 U. S. 542.

[64] *Chicago, M. & St. P. R. Co.* v. *Minn.*, 134 U. S. 418; *At. C. L. R. Co.* v. *Florida*, 295 U. S. 301; *U. S.* v. *Morgan*, 307 U. S. 183.

[65] *Jackson County* v. *United States*, 308 U. S. 343, 350.

stitutional statute is not an operative rule [66] for the protection of action taken under it, but as an "operative fact" [67] it may precipitate action protected by a rule of justice. Analogous disposition is made of an assignee who, because of the infirmity of the assignor's title, is not protected by the assignment but must turn for protection to the rule of estoppel.[68]

In *Norton* v. *Shelby County, supra*, the bond issue based upon the unconstitutional statute had no legal support because none could be drawn from any rule of justice. The Court stated that the circumstances pointed to a rule of justice to support a rescission of the bond transaction presented in the suit if the county still held the railroad stock received in payment for the bonds. (118 U. S. 425, 454) Having recognized that the effect of invalidity is governed by rules of justice derived from the facts of the case, it is reasonable to conclude that the Court would have upheld the bond issue if the facts had developed a rule of justice to support it.

In the case of *Chicot County Drainage District* v. *Baxter State Bank, supra*, the adjustment of the bonded debt, under the provisions of the statute later declared unconstitutional, was upheld because it was supported by a rule of justice derived from the fact that the bondholder allowed the adjustment to be perfected without seizing the opportunity he had to challenge the validity of the statute. Since the Court recognized that the effect of invalidity is governed by rules of justice derived from the facts, it is

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[66] *Marbury* v. *Madison*, 1 Cranch. 137, 177.

[67] *Chicot Country Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374.

[68] *Cowdrey* v. *Vandenburgh* (opinion by Mr. Justice Field), 101 U. S. 572 (154 U. S. 659); *Looney* v. *District of Columbia*, 113 U. S. 258; *Laughlin* v. *District of Columbia*, 116 U. S. 485; *Gleason* v. *District of Columbia*, 127 U. S. 133.

reasonable to conclude that the Court would not have upheld the adjustment if the validity of the statute had been challenged at the proper time. The decision did not turn on the fact that the adjustment was made before the Court had time to pass upon the statute, which would have been decisive if the statute had been valid until declared invalid. In frowning upon "an all-inclusive statement of a principle of absolute retroactive invalidity" and turning to "consequences which cannot justly be ignored" (308 U. S. 371, 374), the Court must have meant that merely because the statute is void ab initio is no reason for disregarding equitable considerations found in acts occasioned by the statute. That the "past cannot always be erased by a new judicial declaration" (308 U. S. 371, 374) must have reference to the consequences of the statute; otherwise the doctrine would be that some statutes are void ab initio while others are not. The statute was an "operative fact" (308 U. S. 371, 374) in furnishing the color for the adjustment, but the adjustment was upheld because it received "the blessing of res judicata."[69] That the circumstances and not the statute furnish the basis for determining the effect of invalidity is clearly shown by the Court's reference to "the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions." (308 U. S. 371, 375) (If the statute is not void ab initio there

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[69] *Warring* v. *Colpoys*, 122 F. (2) 642, 646; cert. den., 314 U. S. 678. To the same effect, see *May* v. *Maricopa Co. M. W. C. Dist.*, 112 P. (2) (Ariz.) 204, 205; *Dodge* v. *Detroit Trust Co.*, 300 Mich. 575, 2 N. W. (2) 509, 522, 523; *Weiner* v. *Wittman*, 27 A. (2) (N. J.) 866, 867; *Rigby* v. *Great A. & P. T. Co.*, 344 Pa. 242, 25 A. (2) 401, 404, 405; *Hartman* v. *H. O. L. C.*, 7 N. W. (2) (S. D.) 720, 721; *Miller* v. *Wis. Dept. of Tax.*, 241 Wis. 145, 5 N. W. (2) 749; 750 (318 U. S. 782). Even res judicata is insufficient as a rule of justice to prevent habeas corpus where the correction is made by simply allowing the prisoner to leave the jail. *Ex parte Baer*, 20 F. (2) 912; cf. *Tari* v. *State*, 159 N. E. (Oh. St.) 594, 599; *Stephenson* v. *State*, 119 Oh. St. 349, 164 N. E. 59.

is no occasion for considering the consequences of a ruling against validity in relation to "past transactions." No support is perceived for the view that the decision marks "the Supreme Court's express repudiation of the theory that an unconstitutional statute is a nullity which can confer no rights."[70] The Court did not depart from *Metzger Motor Car Co.* v. *John W. Parrott*, 233 U. S. 36, 42, where it was stated that the effect of the state court's decision was that "ab initio the statute was void," that there were no consequences in the form of "rights acquired under contract in the light of a settled rule of state interpretation of a state law or Constitution," and that there was "no foundation whatever for upholding assumed rights which can alone rest upon the existence of a state statute when the state court of last resort has held there is no valid statute to sustain them." That case shows tha he doctrine of void ab initio and the rules of justice go along together, and that while the rules may be different because of the facts the doctrine remains the same.

It is inaccurate to say that courts in states recognizing the doctrine "have not hesitated to relax the rule or make exceptions to it when its application would work an injustice to the public or to innocent third persons."[71] Actually these courts have not relaxed the rule or made exceptions to it, but they have applied the rules of justice to the facts of the case.[72]

In several tax cases the courts have intimated that the decision in the *Chicot County Drainage District* case im-

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[70] 49 Yaw Journal 959, 962. In *Armbruster* v. *City of Middletown*, 58 N. E. (2) (Ohio App.) 778, 784 (app. dismissed, 58 N. E. (2) 784), the Chicot decision was viewed as a refusal to follow "to its coldly logical conclusion" the "sweeping language" in the Norton decision, but the Court obviously was influenced by the fact that the question of invalidity was not raised at the outset.

[71] 99 A. L. R. 304.

[72] Cf. *U. S.* v. *U. S. F. & G. Co.*, 309 U. S. 506, 514.

paired the doctrine of void ab initio. Actually the decision was the reason for protecting the taxpayer on some equitable ground of hardship or compulsion rather than as the reason for treating the invalid tax statute as valid until declared invalid.[73]

6. *Application of the rules of justice*

In *Nichols* v. *City of Cleveland*, 247 Fed. 731, where city officials, holding office under an unconstitutional statute, used private property for a public purpose, the Court said: "It would be a strange, and certainly an arbitrary rule that would forbid an owner to protect his property rights through challenge of the constitutional validity of the only statute relied on to justify the exercise of such a power as that of eminent domain." (p. 739)

There is no rule of justice that allows the sovereign to avoid payment for the use of the property taken under an unconstitutional statute by simply paying the amount of the value of the property taken. In this respect there is no difference between a municipality and a private corporation having the power of eminent domain (*ibid.*, 247 F. 734, 740), and if a municipality must pay for the use no reason is perceived for exempting the state. The traditional immunity of the sovereign is inapposite, since payment for the use is a part of the just compensaton.[74]

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[73] *J. A. Daugherty, etc.* v. *Com'r of Int. Rev.*, 121 F. (2) 700; *Davies' Estate* v. *Com'r of Int. Rev.*, 126 F. (2) 294 (cert. den., 317 U. S. 640); *Com'r of Int. Rev.* v. *Security Flour Mills Co.*, 135 F. (2) 165, 169 (dissent) (aff., 321 U. S. 281). Cf. *Athens Roller Mills* v. *Com'r of Int. Rev.*, 136 F. (2) 125; *Moore* v. *Goodyear Tire & Rubber Co.*, 141 F. (2) 328, 331. As indicated in *Ben Bimberg Co., Inc.* v. *Helvering*, 126 F. (2) 412 (cert. den., 317 U. S. 641), the Daugherty decision did not "genarally" contradict the power of the Commissioner to cancel the taxpayer's deduction because the statute was void ab initio. That is true also in the other cases.

[74] See *Carter* v. *Town of Pearisburg*, 173 Va. 346.

The appellee is in no position to claim a benefit through possession taken and use made "on the faith of any settled rule of decision" as to the validity of the statute assailed (*ibid.*, 247 F. 731, 741), or through any failure of the appellant to act. At no time has the appellant led the appellee to believe that there was no illegality in what the appellee was doing. He was warned of the illegality of his acts by the appellant and also by the decisions in West Virginia disapproving a similar statute which formed the pattern for the statute assailed.[75]

From the very beginning of the appellee's use of the property for the state, the appellant has actively contested the validity of the statute and the use of the property; and the appellee continued to use the property for the state "in spite of the continued pendency of the litigation, and so was legally chargeable with the peril" of having the use declared to be illegal "because of the constitutional infirmity of the statute." (*Ibid.*, 247 F. 731, 741, 742.)

The appellant has never given the appellee any cause to believe that the appellant was willing for the property to be used by the state free of charge. When the appellee filed the condemnation proceedings just as the Supreme Court of Appeals of Virginia was about to pass upon the statute upon which the use was based, the postponement of the proceedings by consent had no reference to the use of the property; and from that consent it can not be implied that the appellant was willing for the property to be used by the state free of charge.

When the appellant's attack on the statute was frustrated by the filing of the condemnation proceedings, and after the Court decided that the appellant had a "prompt remedy" (182 Va. 70, 75), the appellant made a timely attack on the

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[75] *McGibson* v. *Roane County Court*, 95 W. Va., 338; *Simms* v. *Dillon*, 119 W. Va. 284. Aside from these stop signals, appellee was sufficiently warned by the views expressed in *Bragg* v. *Weaver*, 251 U. S. 57.

statute on a different ground, growing out of the disfigurement of the property. Since this ground of attack was not available to the appellant until the appellee had filed the condemnation proceedings after disfiguring the property, the principle of res judicata, enunciated in the *Chicot County Drainage District* case (308 U. S. 371) is not available to the appellee to justify the use of the property free of charge. This is not a case in which the claimant could have attacked on the ground that an injury was imminent or threatened. The injury from the unconstitutional feature of the statute is not attributable to the disfigurement of the property alone, but derives from the filing of condemnation proceedings after the disfigurement. If the equity suit had not been filed the appellant would have been entitled to attack the statute in the condemnation proceedings on the ground that the appellee waited until he disfigured the property before he filed the proceedings. The filing of the equity suit did not operate to advance the time for making this attack on the statute. It would be absurd to preclude the appellant upon the ground that he should have sought mandamus to compel the appellee to file the proceedings before the disfigurement, in the face of the plain provision of the statute that the appellee is under no duty to file the proceedings until after he completes the highway and sixty days thereafter.[76]

This case is entirely different from *King* v. *Philadelphia County*, 154 Pa. St. 160, where the improvements were made and used for several years before the owner made any objection, and when he did object he wanted the improvements to be torn up and removed. The officials in that case had no warning of any legal objections to what they did.

The fact that for approximately a quarter of a century

[76] *Smith* v. *Cahoon*, 283 U. S. 553.

in Virginia various statutes have been used as the ground for the uncompensated use of private property for state highways is no valid reason for precluding the appellant on the ground of "public policy in the light of the nature both of the statute and of its previous application."[77] Those who have failed to attack the statute before their titles were divested are not now in a position to attack the statute, or to claim compensation for the use of their properties, but that has no bearing upon the appellant's right to attack the statute or upon the duty of the state to pay for the use of the appellant's property.

7. Use under an unconstitutional statute

The use of private property for a public purpose before acquiring the legal title and without lawful authority is prohibited by due process.[78] The authority to use the property may be conferred upon a state official by a valid statute or court order, but a state official does not have that authority merely because the state has conferred upon him the power to acquire the legal title by eminent domain.[79] Since the statute, upon which the appellee based the taking, mutilation and use of the appellant's property before acquiring the appellant's title, is unconstitutional, and void ab initio, the appellee had only the power to acquire the legal title by eminent domain, and the use of the property for state highway purposes has been and still is without

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[77] *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374.

[78] *Carter* v. *Town of Pearisburg*, 173 Va. 346, 350; *Hustead* v. *Barron*, 75 Fed. (2) 169, 170.

[79] *Litchfield* v. *Bond*, 186 N. Y. 66. Even where the use is authorized by a valid statute, if the property is taken and used without strict compliance with the statutory requirements the taking and use are unlawful. *Cherokee Nation* v. *So. Kan. R. Co.*, 135 U. S. 641, 661.

lawful authority,[80] and in violation of the due process clause of the Fourteenth Amendment.

8. *Question of severability*

The argument may be advanced that since it is not constitutionally objectionable for a statute to grant authority to mutilate, disfigure, and use private property before filing condemnation proceedings, the use of appellant's property is unobjectionable because the statute assailed contains a provision for that authority and the provision is severable from the provision authorizing the appellee to control the filing of the proceedings. The statute does not contain a severability provision.[81] The presumption is, therefore, that the legislature intended the statute "to be effective as an entirety,"[82] and the presumption becomes conclusive if severance would violate the inducement of the statute and the intention of the legislature.[83]

The presumption that the legislature intended the statute to be effective as an entirety is made conclusive by the following provision expressing the intention of the statute: "It is the intention of this section to provide that such property and rights of way may, in the discretion of the commissioner, be condemned after the construction of the highway, as well as prior thereto * * *" (ante p. 18). From this provision it is obvious that the legislature did not intend that the owner should have the power to compel the appellee to file condemnation proceedings during the construction of the highway, and it is plain that the reason

[80] *Hursh* v. *First Div. St. P. & P. R. Co.*, 17 Minn. 439 (17 G. 417); *Hale* v. *Lawrence*, 21 N. J. Law 714; *Nichols* v. *City of Cleveland*, 247 Fed. 731 (cert. den., 246 U. S. 668).

[81] Virginia Acts 1940, c. 380. The severability clause in the 1922 Act, C. 403, sec. 14, was dropped in the 1940 Act.

[82] *Williams* v. *Standard Oil Company*, 278 U. S. 235, 241.

[83] *Thorne* v. *Burke*, 18 N. W. (2) (Neb.) 664.

was that the legislature did not want the owner to compel the commissioners to view the property while it was being mutilated and disfigured. Yet, that is precisely what the owner would have the authority to do if the provision authorizing the seizure, mutilation, disfigurement, and use of the property should be allowed to stand alone.[84] He would have "the run of the entire bus", as the Court in *Morgan* v. *Com.*, 34 S. E. (2) (Va.) 491, 496, said of the interstate passengers, and the result would be that the statute "in its entirety would effectively be disrupted." (*Ibid.*) It is plain, therefore, that the legislature would not have enacted the statute with the unconstitutional provisions eliminated.[85]

The use of the property as a state highway is merely incidental to the "main design" of the statute, which is to prevent the owner from having the property viewed until after the highway and the alteration of the property have been completed. "That which is merely auxiliary to the main design must fall with the principal of which it is merely an incident."[86]

III. Interest on Damages Awarded for Injury to Residue

A. Question of Interest Not Submitted to Commissioners.

The claim for interest on the damages awarded was not submitted to the commissioners. Before it can be established that they included interest in the award, an affirmative showing to that effect must be made. There is nothing in their report or in any part of the record to show that they had before them any evidence bearing upon the cause of the delay in the filing and postponement of the condemnation pro-

[84] *Hicks* v. *Anderson*, 182 Va. 195.
[85] *Howard* v. *Ill. C. R. Co.*, 207 U. S. 463, 501.
[86] *Poindexter* v. *Greenhow*, 114 U. S. 270, 304.

ceedings.[87] The award simply recited "there was $6,500.00 damages resulting to the adjacent or other property of the owner from the construction and operation of said highway." (R. 29)

B. Fundamental Right Guaranteed by the Fourteenth Amendment

1. *Right to just compensation*

In the law of eminent domain the right to just compensation derives from fundamental principles of liberty and justice by which the ownership and use of private property are protected.[88] To say that the right depends upon a specific mandate is to imply that free government does not exist. The specific mandate is merely the positive expression of the existing fundamental right,[89] which is guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States.[90]

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[87] *Minn.* v. *Wilkin*, 30 Minn. 145, 15 N. W. 668. The case of *Bridgeman* v. *Hardwick*, 67 Vt. 653, 32 A. 502, is distinguishable, because there the award recited that the owner was entitled to "recover" a certain amount.

[88] *Fletcher* v. *Peck*, 6 Cranch. 87, 135, 139; *Garrison* v. *New York*, 21 Wall. 196, 203, 204; *Cairo, etc., R. Co.* v. *Turner*, 31 Ark. 494, 499; *Chicago, B. & Q. R. Co.* v. *P. U. Com.*, 69 Colo. 275, 277; *Bristol* v. *New Chester*, 3 N. H. 524; *Orr* v. *Quimby*, 54 N. H. 590; In re *Bergen, etc., Counties*, 22 N. J. L. 293; *People* v. *Priest*, 206 N. Y. 274; *City of Raleigh* v. *Hatcher*, 220 N. C. 613; *Hyde* v. *Minn., etc., R. Co.*, 29 S. D. 220, 229; *Noble* v. *Martin*, 191 Wash. 39.

[89] *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 324, 325. "The framers of the federal Constitution did not even think it necessary to place therein any guaranty of this right to recover damages, thus showing that this right was fully recognized." *Hyde* v. *Minn.*, *supra*.

[90] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 234-241; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 565; *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 582, 592-594; *Appleby* v. *Buffalo*, 221 U. S. 524, 530-532; *Consolidated Turnpike Co.* v. *Norfolk & O. V. R. Co.*, 228 U. S. 326, 330; *McGovern* v. *New York*, 229 U. S. 363, 370; *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363, 365;

Fundamental justice is the vital ingredient of both the due process clause, which includes all deprivations in the public interest, and the compensation mandate, which confines the protection to property taken for a public use. Compensation required by the former is more comprehensive than that required by the latter, but all compensation required by the latter is required by the former because all compensation required by the compensation provision derives from fundamental justice and all compensation drawn from that source is required by due process.[91]

2. *Right to damages for injuries*

Compensation for certain undefined injuries, where no part of the property is taken for public use, is required by the fundamental principles of justice embodied in due process,[92] and by the "spirit" of the compensation mandate.[93]

Since damage to property where no part is taken is compensable under due process because of fundamental justice,

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Producers Transp. Co. v. *R. R. Com.*, 251 U. S. 228, 230, 231; *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, 413, 415, 416; *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 191, 193, 194, 195, 197; *Dohaney* v. *Rogers*, 281 U. S. 362, 366; *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613, 618; *Roberts* v. *New York*, 295 U. S. 264.

[91] Fundamental rights protected by the first eight amendments are protected by the Fourteenth, not because they are enumerated but because they are fundamental. *Twining* v. *New Jersey*, 211 U. S. 78; *Powell* v. *Alabama*, 287 U. S. 45; *Palko* v. *Conn.*, 302 U. S. 319; *Betts* v. *Brady*, 316 U. S. 455.

[92] *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 331-334; *Hopkins* v. *Clemson Agri. College*, 221 U. S. 636, 646-648; *McCoy* v. *Union Elevated R. Co.*, *supra*; *Penn. Coal Co.* v. *Mahon*, *supra*; *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, *supra*.

[93] *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 551-554, 557. Cf. *Sharp* v. *U. S.*, 191 U. S. 341, 353-356; *U. S.* v. *Welch*, 217 U. S. 333, 338, 339; *Campbell* v. *U. S.*, 266 U. S. 368, 371; *U. S.* v. *Miller*, 317 U. S. 369, 375, 376.

there is no valid ground for contending that due process does not guarantee compensation for damage to the residue where a part of the property is taken. Compensation for damage to the residue is required by the compensation mandate,[94] but the damages and benefits to the residue are also assessed upon "general principles" and "with due regard to right and justice,"[95] and a denial of compensation for damage to the residue would be a "travesty upon justice."[96] That compensation for injury to the residue derives from fundamental justice, and not from the circumstance that the claim is made under the compensation mandate rather than under due process, is illustrated by the distinction between the case in which compensation for special damage to the residue is allowed and that in which compensation for damage of a general character is denied.

3. *Right to interest on damages*

If damage to the residue is compensable under due process, there is no valid ground for contending that interest on the damages awarded is not compensable under due process. Payment of interest is not expressly required by the compensation mandate of the Fifth Amendment, and yet in *Jacobs* v. *U. S.*, 290 U. S. 13, payment was required.[97] Under the Fourteenth, as well as under the Fifth Amendment, interest on the damages must be paid as a matter of

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[94] *Bauman* v. *Ross*, 167 U. S. 548, 574, 575, 584; *Sharp* v. *U. S.*, 191 U. S. 341, 354, 355; *Campbell* v. *U. S.*, 266 U. S. 368, 371; *U. S.* v. *Miller*, 317 U. S. 369, 375, 376.

[95] *Pottawatomie Com'rs* v. *O'Sullivan*, 17 Kan. 58, 60; *Bauman* v. *Ross*, 167 U. S. 548, 581, 582.

[96] *U. S.* v. *Grizzard*, 219 U. S. 180, 185, 186.

[97] In the case of *In re Bronx River Parkway, etc.*, 284 N. Y. 48, 29 N. E. (2) 465, 468 (aff., 313 U. S. 540), in which *Jacobs* v. *U. S.* was discussed, the Court said that interest must be paid "so that the compensation may be just." In Lewis on Eminent Domain (3rd ed.), vol. 2, sec. 742, the author states that the payment of interest is "just to the owner."

fundamental justice, not because of particular terminology. To say that interest is required under the Fifth Amendment because of the term "just", but not required under the Fourteenth Amendment because of the absence of that term—"to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them."[98] The term "just" in the Fifth Amendment is superfluous,[99] and it is incapable of supporting a substantial distinction between the two securities. In the *Grizzard* case (219 U. S. 180) and the *Jacobs* case (290 U. S. 13), undoubtedly the same result would have been reached had the claims been made under the due process clause of the Fifth Amendment. Due process of the Fifth is no stronger than due process of the Fourteenth Amendment,[100] and "there is certainly a very broad correlation in coverage."[101]

The fundamental character of the right to interest on the amount awarded in condemnation proceedings from the date of entry on the land is disclosed by the decisions of the state courts. In forty states it has been decided that payment of interest on the award from date of entry on the land is a constitutional requirement, with no indication of any distinction between interest on the damages awarded for injuries to the residue and interest on the amount awarded for the land taken, and in eighteen of these states the decisions included interest on the damages awarded for injuries to the residue.[102] In six of these forty states the courts

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[98] *Snyder* v. *Mass.*, 291 U. S. 97, 122.

[99] *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 326; see also *State, etc.*, v. *Merrell*, 127 Ohio State 453, 189 N. E. 116; *Simms* v. *Dillon*, 119 W. Va. 284.

[100] *Twining* v. *New Jersey*, 211 U. S. 78, 101.

[101] *Screws* v. *U. S.*, 89 L. Ed. 1029, 1048.

[102] *South. R. Co.* v. *Cowan*, 129 Ala. 577 (interest on damages), also *South. R. Co.* v. *Clark*, 220 Ala. 555; *Donaghey* v. *Lincoln*, 171 Ark. 1042 (interest on damages); *Metropolitan Water Dist., etc.* v. *Adams*, 16 Cal. (2) 676; *Town of Stamford* v. *Vicono*, 108 Conn. 359 (interest on damages); *Selma, R. & D. R. Co.* v. *Rederine*, 51 Ga. 470; *Boise Valley*

have held that just compensation is required by fundamental justice.[103] In four states interest is allowed by statute,[104] and in one state bond is required in an amount approved by

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Con. Co. v. *Kröeger*, 17 Idaho 384 (interest on damages); *Moll* v. *Sanitary Dist.*, 228 Ill. 633; *Schnull* v. *Ind. U. R. Co.*, 190 Ind. 572 (interest on damages); *Weldon* v. *Iowa St. High. Com.*, 211 Iowa 625 (interest on damages); *Fleming* v. *Board of Com'rs., etc.*, 119 Kan. 598 (interest on damages); *Com. ex-rel.* v. *H. Com.* v. *Adams*, 220 Ky. 151, also 224 Ky. 556; *Shreveport & A. R. Co.* v. *Hollingsworth*, 42 La. Ann. 749 (interest on damages, but not until amount ascertained); *Bangor & P. R. Co.* v. *McComb*, 60 Me. 290 (interest on damages); *Norris* v. *Baltimore*, 44 Md. 598; *Imbescheid* v. *Old Colony R. Co.*, 171 Mass. 209 (interest on damages); *Compau* v. *City of Detroit*, 223 Mich. 519; *Minn.* v. *Wilkin*, 30 Minn. 145; *Williams* v. *New Orleans, M. & T. R. Co.*, 60 Miss. 689; *Miller* v. *St. Louis & K. C. R. Co.*, 162 Mo. 424; *Butte Elec. R. Co.* v. *Mathews*, 34 Mont. 487; *Langdon* v. *Loup River P. P. Dist.*, 13 N. W. (2) (Neb.) 168 (interest on damages); *Goodrich Falls Elec. Co.* v. *Howard*, 171 A. (N. H.) 761; *Duncan Hood Corp.* v. *City of Summit*, 105 N. J. L. 583 (interest on damages from date of ordinance, construed as date of taking); *Atchison, T. & S. F. R. Co.* v. *Richter*, 20 N. M. 278; *In re Bronx River Parkway, etc.*, 284 N. Y. 48 (313 U. S. 540), also *In re West 151 St., etc.*, 222 N. Y. 370; *Abernathy* v. *S. & W. R. Co.*, 159 N. C. 340 (interest on damages, semble); *Donaldson* v. *City of Bismarck*, 71 N. D. 592 (interest on damages); *State, etc.* v. *Merrell*, 127 Oh. St. 453; *Okla. City* v. *Wells*, 91 P. (2) (Okla.) 1077; *Whitcomb* v. *City of Philadelphia*, 264 Pa. 277; *So. New Eng. R. Co.* v. *Shuttleworth*, 38 R. I. 216; *Haig* v. *Waterce Power Co.*, 119 S. C. 319; *Alloway* v. *City of Nashville*, 88 Tenn. 510 (interest on damages); *State* v. *Hale*, 136 Texas 29 (interest on damages); *Salt Lake & U. R. Co.* v. *Schramm*, 56 Utah 53; *Bridgeman* v. *Hardwick*, 67 Vt. 653 (interest on damages); *Attorney General* v. *Turpin*, 3 H. & M. 548, also see *City of Richmond* v. *Goodwyn*, 132 Va. 442; *Bellingham Bay & B. C. R. Co.* v. *Strand*, 14 Wash. 144; *Appleton Waterworks Co.* v. *R. R. Com.*, 154 Wis. 121; *Simms* v. *Dillon*, 119 W. Va. 284 (interest on damages, semble).

[103] *Cairo, etc., R. Co.* v. *Turner*, 31 Ark. 494, 499, and *Donaghey* v. *Lonsdale*, 171 Ark. 1042; *Orr* v. *Quimby*, 54 N. H. 590, and *Goodrich Falls Elec. Co.* v. *Howard*, 171 A. (N. H.) 761; *In re Bergen, etc., Counties*, 22 N. J. L. 293, and *Duncan Hood Corp.* v. *City of Summit*, 105 N. J. L. 583; *People* v. *Priest*, 206 N. Y. 274, and *In re Bronx River Parkway, etc.*, 284 N. Y. 48 (313 U. S. 540); *City of Raleigh* v. *Hatcher*, 220 N. C. 613, and *Abernathy* v. *S. & W. R. Co.*, 159 N. C. 340; *Noble* v. *Martin*, 191 Wash. 39, and *Bellingham Bay & B. C. R. Co.* v. *Strand*, 14 Wash. 144.

[104] Arizona Ann. Code 1939, sections 27-916, 27-1016; Florida Statutes Ann., section 74.06 (interest allowed as "a part of the just compensation awarded"); Nevada Comp. Laws 1929, sec. 6197.36; see also sections 9162 and 9169; Oregon Comp. Laws, section 12-404; cf. sections 12-302, 12-310, and 12-317.

the court for the payment of the "condemnation money, compensation and costs." [105] In the three remaining states, apparently possession is not allowed prior to the award.[106] No state fails to recognize interest as an essential part of "just" compensation; and it is safe to say that no state would deny interest on the ground that while it is "just" to pay it, non-payment is not repugnant to due process.

In the early case of *Attorney General* v. *Turpin*, 3 H. & M. 548, the Supreme Court of Appeals of Virginia held that the owner was entitled to interest for delay not caused by "his own default or neglect" (3 H. & M. 548, 564). The right to interest was upheld even though the legislature had not authorized the payment of interest. In *City of Richmond* v. *Goodwyn*, 132 Va. 442, it does not appear that possession had been taken, but the Court recognized that the right to interest is a constitutional right derived from "the duty and obligation to make just compensation," and that "Whatever is an essential element in that compensation cannot be excluded, even by legislative enactment" (132 Va. 442, 447), and the Court cited *Attorney General* v. *Turpin*, *U. S.* v. *Rogers*, 257 Fed. 397, *Alloway* v. *Nashville*, 88 Tenn. 510, and *Appleton, etc.* v. *R. Com.*, 154 Wis. 121, in which the right to interest from the time of taking possession was clearly recognized.

4. *Arbitrary denial of fundamental right*

The right to interest is not an absolute right, but it is not less fundamental because it depends upon "the totality of facts in a given case." [107] The owner is obviously not entitled to interest if he compels the public official to delay the pay-

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[105] Wyoming Rev. Stats. 1931, sections 38-226, 38-227, 38-411, 38-412.

[106] Colorado Statutes Ann. 1935, c. 61, sections 6, 11, and 14; Delaware Rev. Code 1935, section 1676; South Dakota Code 1939, sections 37.4001, 37.4012.

[107] *Betts* v. *Brady*, 316 U. S. 455, 462.

ment of compensation, or if he agrees to allow the official to withhold compensation without the payment of interest. But in the absence of compulsion by the owner, or agreement by him, he is entitled to be compensated by the payment of interest during the time of the delay. The owner's expression of an opinion conflicting with that of the public official, or even his vigorous criticism of the acts of the public official, can not operate, under a free government, to deprive him of the right to interest so long as the official is free to act.

The damage to the residue is inflicted at the time the mutilation is commenced.[108] To deny interest on the damages finally awarded would allow the government to continue to damage the residue and to have free use of the money to which the owner is entitled for the damage. Fundamental fairness demands that interest be paid, where the delay can not be prevented by the owner, even though the owner is resisting the destruction of the operation of his business, and where the public official could easily prevent and finally does prevent the injury by agreeing to preserve the operation of the business in accomplishing his public purpose. In denying interest under these circumstances, the Court "disregards those fundamental principles * * * which * * * protect the citizen in his private right, and guard him against the arbitrary action of government,"[109] and allows a free citizen to be treated as a mere puppet of a public official.

Due process of law, guaranteed by the Fourteenth Amendment, must be observed by a state court in the rulings by which compensation is determined; and while due process is not a panacea for erroneous rulings it operates against

[108] *U. S.* v. *Grizzard*, 219 U. S. 180; *Jacobs* v. *U. S.*, 290 U. S. 13.

[109] *Twining* v. *New Jersey*, 211 U. S. 78, 101.

arbitrary rulings by which fundamental rights are denied.[110]

The question in this case is not whether the amount allowed was sufficient to afford just compensation, as in the *Appleby* case, the *McGovern* case, and the *Roberts* case. No amount whatever was allowed for interest from the time the property was damaged, on October 15, 1941, until the final judgment was entered in the condemnation proceedings on August 11, 1944, a period of over thirty three months. The denial of interest was not the result of a "dubious mistake in the appraisal of the evidence" (295 U. S. 264, 278). It was the result of an arbitrary refusal to be governed by the undisputed facts relating to the delay in payment of damages, which furnishes the ground for the review of the facts to determine whether the asserted federal claim is supported by the record. [111]

The appellant seeks relief under the due process security of the Fourteenth Amendment on the ground that the denial of the fundamental right to interest on the damages awarded was "gross and obvious, coming close to the boundary of arbitrary action," [112] in that the Court, without assigning or having any reason, ignored fundamental rules of equity and fairness which were clearly indicated by the undisputed record facts. The Court ignored the right to recover interest "*ex aequo et bono*," and refused

[110] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241, 242; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557; *Appleby* v. *Buffalo*, 221 U. S. 524; *McGovern* v. *New York*, 229 U. S. 363; *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 362, 363, 365; *Roberts* v. *New York*, 295 U. S. 264, 277.

[111] *Truax* v. *Corrigan*, 257 U. S. 312, 324, 325; *Hoover & Allison Co.* v. *Evatt*, 89 L. Ed. 852, 857; *Brooklyn Sav. Bank* v. *O'Neil*, 89 L. Ed. 876, 880. For this purpose the record in *Bailey* v. *Anderson*, 182 Va. 70, is before the Court by stipulation of the parties filed October 9, 1944, in the trial court (R. 38). This record is No. 829, October Term 1943, in which certiorari was denied, 321 U. S. 769.

[112] *Roberts* v. *New York*, 295 U. S. 264, 277.

to consider rights "measured by equitable standards."[113] The Court declined to be guided by "those flexible considerations of equity which are established sources for judicial law-making,"[114] and which form the basis for the determination of just compensation.[115] The Court denied interest on the damages awarded without giving any consideration to the causes of the delay in payment, which began when the appellee seized the land, continued through the equity suit, the condemnation proceedings, and down to the present time.

C. Causes of Delay

1. Period in Which Equity Suit Was Pending

a. Issues raised and relief sought in equity suit

The bill in the equity suit was filed five days after the land was seized (R. 21, No. 829). It alleged, and by demurrer the appellee admitted, that the construction of the highway over the mill race would result in a complete breakdown of the race and a permanent stoppage of the operation of the mill by water power (R. 24, No. 829). It set forth in detail the facts bearing upon the operation of the mill and the effect of the new highway (R. 22, 23, No. 829). It alleged that the highway officials refused to make a survey of the existing highway to see what could be done to lighten up the curvature so as make it unnecessary to build the highway over the mill race (R. 26, No. 829). It did not allege that the appellant was a better judge of the location of highways than the appellee, or that the relocated highway was no better than the old one, or that

[113] *Stone* v. *White*, 301 U. S. 532, 535.

[114] *Jackson County* v. *U. S.*, 308 U. S. 343, 350.

[115] *U. S.* v. *Rogers*, 255 U. S. 163; *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299, 304.

aside from the mill question the appellee abused his discretion in relocating the highway, or that the appellant would not be satisfied with the relocated highway even if the appellee would guarantee that the water would not be interrupted or would undertake to keep the pipes under the highway free from obstructions, or that the appellee had assured the appellant of all this but that the appellant refused and would continue to refuse to accept any such proposal. There is nothing whatever in the bill to indicate that the mill allegations were trivial and designed to interpose artificial obstructions to the relocation of the highway. It alleged that the mill was devoted to a public use (R. 28, No. 829), and that the appellee had no express authority to destroy the operation of the mill and no implied authority to do so because he had another acceptable way to improve the highway without disturbing the mill race (R. 28, No. 829). There is no ground for contending that the appellant's demands were unreasonable. It was sensible to preserve the operation of the mill, if practicable, and the appellee was the only one who had the power to do it. That the appellant did not succeed in convincing the Court that the mill was devoted to a public use within the rule which he sought to invoke does not prove that the appellee had no practicable means of keeping the water flowing to the mill under the new highway. All that he had to do was to say that he would attend to that, or that it was impossible for him to do so.

The bill did not allege, and the appellant did not contend that the appellee had no authority to condemn, that is, to acquire the title to the land he seized or to the land forming a part of the mill race. The bill sought to prevent obstructions in the mill race, not to obstruct the condemnation of the mill race. The appellant's contention was that the appellee had no authority to condemn the land if by doing so he would place obstructions in the mill race, but

he did not contend that aside from those obstructions the appellee had no authority to condemn the land.[116]

The bill alleged that the statute assailed violates due process in that it allows the condemnation proceedings to be postponed by the appellee for an unreasonable length of time after the property is taken (R. 27, No. 829).

The bill prayed for a permanent injunction enjoining and restraining the appellee from the unlawful construction of the highway over the land and through the mill race, and for damages caused by the excavations, fills, and other unlawful acts of the appellee in constructing the highway, and for a mandatory injunction requiring the defendant to restore the land as far as possible to its former condition; also that the statute assailed be declared unconstitutional because the time provided for is unreasonable and allows the taking of private property without due process of law (R. 29, No. 829). The bill did not pray that the appellee be restrained from filing condemnation proceedings.

b. Avoidance of issues by appellee

That the operation of the mill would be destroyed or seriously impaired by the new highway was admitted by the appellee. In his demurrer he stated that he had full power to proceed with the construction through the property, which included the mill race, and that "the bill alleges that the mill had not been in operation for some time and is not now being operated by the complainant, and is not therefore a going concern" (R. 30, No. 829). The latter allegation was inaccurate because the bill alleged "That

[116] In the appellant's pleas, filed July 9, 1943, and March 16, 1944, in the condemnation proceedings, he stated that the appellee "has no authority to condemn the land * * * for the reasons particularly set forth in the petition filed in this Court" in the equity suit, which meant that there was no authority to condemn the land if by doing so the water in the mill race would be obstructed as set forth in the bill.

on account of low water due to the present prolonged drought the mill is not operating continuously but that the mill can and will resume operations when the stream is replenished by rains" (R. 22, No. 829). The appellee's allegation was no more than a statement that he did not have to keep the water flowing to the mill because there had been no rain for some time. That the allegation was without substance is shown also by the fact that when the time came to assess the damages to the operation of the mill the appellee did not stand on the proposition that there would be no damage because the mill was not a going concern (R. 29).

The appellee alleged that by statute he had the power to determine, without judicial review, the necessity or expediency of the location of all highways in his dominion, including the location of the highway in question, and that a hearing on the question of necessity is not essential to due process in the case under the 14th Amendment. (R. 30, No. 829) The appellant did not allege or contend that a hearing was necessary.

The demurrer contained general statements of constitutional principles, none of which reached the point made in the bill, and it alleged that the appellant had not clearly shown that the statute assailed in its operation is unconstitutional as to his situation and that he had been injured by its provisions. Instead of meeting squarely the constitutional objection, the appellee contended that the appellant had no right to make the objection. (R. 30, 31, No. 829)

Certainly the appellee's allegations were not calculated to expedite the determination of the issues which the appellant sought to raise, but they did have the effect of allowing the appellee ample time to proceed with the mutilation and disfigurement of the property. Thirteen months elapsed before the Court, on November 25, 1942, reached a decision sustaining the demurrer (R. 31, No. 829).

The appellant took an appeal. The appellee waited until June 17, 1943, after the Court granted the appeal, and one year and eight months after he seized the land, before he filed condemnation proceedings (R. 36, No. 829; R. 1, No. 49). Then he agreed voluntarily to postpone the proceedings pending the appeal. (R. 36, 37, No. 829) The appellee placed himself in a strategic position to argue that the constitutional question was no longer of any great importance in the case since if the Court decided that he could destroy the operation of the mill the appellant would have the proceedings waiting for him so that the compensation could be ascertained. It is quite obvious that these artificial contentions were not intended to accelerate the consideration of the constitutional question concerning the statute.

c. Questions Decided and Questions Not Decided

The decision of the Court on the appeal in the equity suit was rendered on December 6, 1943 (R. 33, No. 829), approximately twenty-six months after the bill was filed. (R. 21, No. 829) The Court decided that the mill was not devoted to a public use within the meaning of the rule which the appellant sought to invoke (R. 35, No. 829), and that the appellee "clearly has the power to condemn the property in question." (R. 36, No. 829) Accepting the Attorney General's statement, the Court held that the appellant had no right to attack the statute since the condemnation proceedings had been instituted after the completion of the highway and had been postponed until the Court decided the mill question, and after that decision the appellant had a "prompt" remedy in the pending proceedings. (R. 37, No. 829) There is, of course, nothing in the record to show, and the appellee has never contended through the Attorney General or in any other way, that when the proceedings were postponed it was agreed that the Court on appeal in

the equity suit would pass only upon the mill question. If there had been an agreement like that, then the constitutional question would have been out of the case because of the agreement, not because the appellant had a "prompt" remedy. If the parties had come before the Court under an agreement that the attack on the statute had been abandoned because the proceedings were pending, obviously it would have been wholly gratuitous for the Court to determine whether the appellant had the right to attack the statute. The implication that the parties agreed that the Court should confine its attention to the mill question, while buttressing the conclusion that the appellant had a "prompt" remedy, is certainly not a considered adjudication that there was an agreement to that effect.

Whether the appellee could build the highway over the race and still preserve the flow of water to the mill was not before the Court. The Court said that it was alleged in the bill and "admitted" by the demurrer that the appellee in constructing the highway over the race planned to place "large" cement pipes in the race under the highway. (R. 33, No. 829). The bill made no reference to "large" pipes, but the impression given by the reference to "large" pipes may lead to the belief that the pipes could be cleaned easily by workmen standing in the pipes. The bill stated and the demurrer admitted that the plan called for "joints of cement pipe to be set in said mill race under the highway * * * for a distance of between 90 and 100 feet * * * in a bend corresponding to the existing course of the race." The Court stated that the appellant despite several conferences was unable to "impress" the highway engineers with the "gravity" of his objections to the proposed plan. (R. 34, No. 829) The bill stated and the demurrer admitted that the appellant requested the highway officials to make a survey and plat to show what might be done to lighten up the curvature of the existing road, explained to

them "the methods used in operating said grist mill and stated to them that the construction of the proposed road through the mill race and through the hill adjoining the mill race would materially and seriously impair if not stop altogether the operation of said mill for the reasons herein above stated" (R. 26, No. 829), which reasons were given in great detail in paragraph 7 of the bill (R. 24, No. 829), and stated to them that "it would be unlawful to so impair or stop the operation of the mill by the construction of the proposed road." (R. 26, No. 829) The bill states, and the demurrer admitted, that "said officials refused to grant such request and treated lightly the contentions of the complainant in regard to the operation of said mill." (*Ibid.*) Whether they were impressed with the gravity of the objections or not, it is clear that they did nothing about it.[117] If the Court had concluded that the water would flow to the mill because of the "large" pipes or because the appellee intended to keep the pipes clear as evidenced by the fact that he was not "impressed", it would have been unnecessary for the Court to discuss the law on condemnation of properties devoted to a public use (R. 34, 35, 36, No. 829). If the Court had concluded that the appellee was able to keep the pipes clear, but that he refused to do so because he was not impressed with the necessity of it in view of the fact that the mill was not a "going concern", again it would have been unnecessary for the Court to discuss the power to destroy the operation of public service enterprises. Actually the Court accepted the admitted allegations that the mill operations would be stopped by the new highway and that an acceptable highway could be constructed without

[117] Compare the statement in *Davis* v. *Com.*, 182 Va. 760, 763: "The plaintiff in error, who was carrying a number of bundles," and the comment in the dissenting opinion (182 Va. 760, 767): "As a matter of fact, she tells us that she had two bundles," and the opinion states a friend "carried for her this heavy load."

touching the race, and then ruled that still the appellee could stop the operation of the mill. Whether the appellee should keep the water flowing under the new highway, if he found it practicable to do so, was not considered by the Court in ruling that the appellee could stop the mill.

The Court decided that the appellant had no right to attack the statute because payment of compensation had not been "unreasonably delayed" (R. 37, No. 829), but the Court did not decide that the appellee did not cause the delay, or that the appellee could not have avoided the delay. The fact that by consent the proceedings were delayed to enable the Court to decide the appeal in the equity suit was the principal inducement for the ruling that the appellant had not been injured by unreasonable delay. "By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right * * * to condemn. * * * Since we are of opinion * * * that such property is subject to condemnation * * * the appellant is now afforded a prompt remedy in such proceedings * * *" (R. 36, 37, No. 829) The Court did not hold that aside from the consent the proceedings afforded a prompt remedy. The Court passed over the question of the length and cause of the delay before the proceedings were instituted, concluding that there was a "prompt remedy" because of the consent to delay the proceedings. The Court said that it was unnecessary to decide what would have been the appellant's rights "if the payment of such compensation had been unreasonably delayed." (R. 37, No. 829). If the appellant had obstructed the filing of condemnation proceedings the appellant would have been prevented by estoppel from attacking the statute and collecting interest, and whether the delay was reasonable or unreasonable because of the consent of both sides would have been immaterial. The consent simply saved the appellee from the exposure of his delay in instituting the pro-

ceedings. The holding that the appellant was not injured by the delay in a way that entitled him to attack the statute has no relation to the right to collect interest. The right to interest is tested by the duty to prevent the delay, not by the effect of the delay. If the appellant had waited until the appellee instituted the proceedings and had not brought his equity suit, clearly he would have been entitled to interest for the twenty months delay in instituting the proceedings. The fact that the appellant's equity suit was brought seasonably is no reason for denying him interest during the period in which he could have waited for the appellee to act.

2. Delay Caused by Appellee's Neglect

a. Delay in instituting condemnation proceedings

The appellant had no power to prevent the appellee from instituting condemnation proceedings. The appellant's position was that the appellee had no authority to condemn the property if by doing so he would unnecessarily destroy the operation of the mill. He did not contend that the appellee had no power to institute condemnation proceedings, and he did not resist that power. The mill question did not prevent the appellee from instituting condemnation proceedings because the mill question was still unsettled when he instituted the proceedings. The constitutional question did not prevent it because not only was that question unsettled when the proceedings were instituted by the appellee, but the institution of the proceedings actually prevented the constitutional question from being considered by the Court. The condemnation proceedings could have been instituted by the appellee notwithstanding the appellant's acts, and there are no grounds for excusing the delay in instituting proceedings (Cf. *Pelia* v. *Fowler*, 215 Iowa 90, 244 N. W. 734, 736, 737).

If the appellee had instituted proceedings before or immediately after he seized the land, there would have been no constitutional question to raise, either in the proceedings or in any suit brought by the appellant, because the constitutional validity of the statute was a question that the appellee precipitated by failing to institute the proceedings before or immediately after he seized the land. But it will no doubt be argued that even if the appellee had instituted proceedings before or immediately after he seized the land, still the appellant would have raised the mill question, and that would have caused the delay. That argument raises a fundamental question. It is not a question of fact. It is a question of applying the principle of fundamental fairness to the undisputed facts.

b. Delay caused by indifference to the mill question

If the appellee had indicated promptly that he believed it to be impossible or impracticable to keep the water flowing under the highway, that would have been a proper exercise of his discretion to which the appellant would have had to submit. If he had indicated promptly that it was practicable and that he would keep the pipes clear, that would have been sensible and would have satisfied the needs of the mill. If he had stated to the Court that it was practicable, but that he did not intend to undertake it, the Court would not have compelled the appellant to submit to that harsh decision.[118] His decision, after a delay of nearly forty-five months, to keep the pipes clear so that the appellant could operate the mill reflects the practicability of the plan. To contend that he had to wait that long to exercise an "informed" discretion or an "empirical" discretion would not only weaken his excuse in the equity suit

[118] *Southern Ry. Co.* v. *Com.*, 290 U. S. 190; cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

that the mill was not a "going concern" (R. 30, No. 829) but it would be inconsistent with his expert knowledge and ability.

The appellee made no proposal to keep the pipes clear under the highway. That he had no such intention is disclosed by his allegation in the equity suit that the mill was not a "going concern" (R. 30, No. 829), by his contention on appeal that because of his sovereign character he was not affected by the rule that the authority to condemn property devoted to a public use must be manifested either by express legislative authority or by necessary implication (R. 35, No. 829), and by his contention that the appellant's grist mill was not a public service enterprise within the rule he sought to invoke (R. 35, 36, No. 829). The appellant has no right, and does not intend, to question the decision of the Court that "the appellant's property is not devoted to a public use within the meaning of the rule which he seeks to invoke" (R. 35, No. 829). His purpose is to point out that the appellee believed and contended, and the court felt, that there was considerable authority for the view (*ibid.*) that no public service enterprise may question the appellee's authority to destroy its operations because the appellee partakes of sovereignty and the acquisition of property for state highways is one of his immediate purposes.[119] These contentions, and the delay which they caused, would have been unnecessary if the appellee had been willing to lay aside the mask of sovereignty and to display reasonable and active interest in preserving the operation of an enterprise which has been in existence since the last days of George Washington, and in his home county, and has

[119] Cf. *State Highway Com.* v. *City of Elizabeth*, 102 N. J. Eq. 221, where the "famous French monarch" was ushered in to illustrate the rigidity and finality of sovereign power. Contra: *U. S.* v. *So. Power Co.*, 31 Fed. (2) 852. See also *U. S.* v. *Gettysburg, etc.*, 160 U. S. 668; *Adirondack Ry. Co.* v. *New York State*, 176 U. S. 335.

served the public, not as a "going concern," but as Providence permitted.

Since the appellee had this grandiose conception of his sovereign capacity when he seized the land, and since he agreed many months later in the compensation hearing to preserve the water for the operation of the mill, it is not difficult to reach the conclusion that when the appellant's suggestions for protecting the mill by leaving the highway in front of the mill "were discussed, considered and rejected by the engineers as being unsatisfactory" (R. 35, No. 829) it was not because they believed that there was no practicable way by which the operation of the mill could be saved. Even though the Court thought that the appraisal of the surrounding conditions without an actual survey of the existing highway constituted a "fair appraisal" (R. 35, No. 829), it cannot be shown that the appraisal was directed to the problem of preserving the current of water under the new highway. In denying interest on the damages awarded the Court apparently did not believe that the appellee was under a special and positive duty to devise, suggest, and undertake without delay a plan for preserving the operation of the mill if he found it practicable to do so. The Court's view apparently was that in opposing the accomplishment of the sovereign's immediate purposes, the appellant acted at his peril.

c. Appellee's duty under the circumstances

The appellant contends that sovereign duties do not shrink as sovereign power expands; that high position, rigorous control, and inordinate discretion do not dispel those fundamental duties exacted of administrative officials exercising the sovereign power on lower levels; that fundamental fairness is gauged by the particular circumstances, not by the status of the administrative official in control;

and that where the duty relates to the treatment to be accorded to one who is subjected to sovereign authority the duty of a state official in constructing important highways is not less than that of the driver who segregates passengers in buses operating on the highway. Distinctions derived from administrative status do not rest on democratic principles.

Because of the Virginia segregation statute, a bus driver is a special policeman under duty to arrange passengers in their seats in accordance with the rule that Negro passengers must seat themselves from the rear and white passengers from the front. In *Davis* v. *Com.*, 182 Va. 760, the Negro passenger insisted upon retaining a seat in the front of the bus while the rear seat was occupied by white passengers. The driver told her to move, but he did not direct a white passenger on the rear seat to vacate so that the Negro could sit there. The driver assumed an attitude of sovereign indifference. He made no effort to straighten out the difficulty. Unlike the appellee, the driver was not responsible for the obstruction causing the trouble, and he had no power to remove the obstruction. That there is no statute directing the appellee to remove obstructions from mill races is immaterial. The segregation statute does not expressly require the bus driver to cause seats to be vacated to overcome objections of Negro passengers. The driver's duty is not greater because of the criminal aspect. The duty rests upon principles of fundamental fairness. In upholding the contention of the Negro passenger, the Court said: "The operator of the bus, by virtue of his employment and the duties imposed upon him by the statute, occupies a position where, in dealing with the public, a high degree of discretion and fairness is required of him. In a sense he is in a position superior to that of the passengers by reason of his right and duty to direct their seating. He should follow both the letter and the

spirit of the law in taking the lead in explaining the situation and in directing its peaceful adjustment. Not only is the duty upon him to provide a seat or space for each passenger, but he is the only one authorized to take such action and to direct its course. Until he had performed the duty placed upon him by the statute, and the plaintiff in error had refused to acquiesce therein, she was guilty of no offense" (182 Va. 760, 766). The appellee really has a stronger duty to be fair because a bus driver can not force a Negro to ride, but a mill owner must yield to the consequences of the highway construction and depend upon the appellee's fairness. Because of the appellee's power, his control, his peculiar knowledge of appropriate methods to be adopted to conduct the water under the highway to the mill, and because the appellant was brought under subjection to that power and control, the appellee was under a special and positive duty to advance the solution and to disclose his willingness to apply it for the appellant's benefit.[120]

d. Absence of Grounds for Estopping Appellant

The appellee is not in a position to contend that he acted innocently and without knowledge of the conditions affecting the operation of the mill, or that the appellant's silence worked an estoppel. The appellant's claim is not "built on an omission induced by him."[121] By demurring to the bill the appellee admitted the detailed allegations in paragraph 7 of the bill (R. 24, 25, No. 829) showing exactly how the new highway would destroy the operation of the mill.

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[120] "Diligence, integrity, and intelligent discretion in the discharge of their duties are required of public officers, particularly where the rights of the public may be jeopardized by their neglect, and their obligation to the public is not discharged by a mere perfunctory performance thereof." 46 C. J. p. 1036, sec. 305.

[121] *R. H. Stearns Co.* v. *U. S.*, 291 U. S. 54, 62.

Perhaps the appellee will argue that his knowledge was not sufficient to prime his duty to provide the solution for the mill problem, and that the appellant should have requested him more specifically to provide the solution. That was the bus driver's attitude in *Davis* v. *Com., supra.* The same argument is disclosed in the testimony of the Senior Highway Engineer, who said that the appellant was offered $2,000, but that if he had asked for $3,000 he would have received it (R. 17), the plain inference being that if the appellant had accepted $2,000 without asking for more, his failure to get $3,000 would have been his own fault (R. 17). A conclusive answer to the argument that the appellant should have made the request is that the appellant would have been in a disadvantageous position if he had made the request before the appellee instituted the condemnation proceedings. The appellant could not force the appellee to institute the proceedings to have the compensation and damages assessed because the statute authorized the appellee to postpone the institution of condemnation proceedings until sixty days after he completed the highway. It cannot be assumed that the appellee would have agreed to keep the pipes clear indefinitely without reducing the offer he made. If it be assumed that the appellee would have given the appellant $3,000, provided he had asked for it, the appellee would have reduced that amount as his price for undertaking permanently to furnish the labor for cleaning the pipes under the highway. Instead of receiving $3,000, probably the appellant would have received nothing, since that amount is not excessive to cover the expense of keeping the pipes clear over an indefinite period of years. There is nothing in the record to support the contention that pipes under highways are always kept clear anyway, and that it would not involve additional expense to the state. If that is true, clearly the appellee failed in his duty to

make that fact known before the appellant incurred the expense of conducting the equity suit.

The appellee may say that he did not propose any plan for keeping the pipes clear because the appellant wanted the new highway to be located in front of the mill instead of in the rear. He may contend that the issue as to location presented a matter solely within his discretion, and that it was not his duty to deviate from that issue since the appellant had raised it. A similar argument was rejected in *Davis* v. *Com.*, *supra*, where the Negro passenger wanted to locate in the front seat instead of in the rear. The appellant's contention that the way to allow him to run the mill without disturbance would be to keep the highway in front of the mill, not touching the race in the rear, was exactly the contention of the Negro passenger whose primary concern was to ride without disturbance. Neither the appellant nor the Negro passenger indicated that a location in the rear would not be accepted if the appellant or the driver removed the "racial" obstruction. That the appellant and the Negro passenger were invading legislative matters does not mean that arranging the highway over the race and the occupants on the rear seat were legislative matters with which the Court could not interfere. By urging that the highway be left in front of the mill, the appellant did not mislead the appellee and cause him to believe that the appellant would object to an undertaking by the appellee to keep the pipes clear under the highway in the rear of the mill. The bill in the equity suit alleged, and the appellee admitted by demurring, that when the appellant was first approached in regard to "the right-of-way for the proposed highway back of said mill," the appellant "protested and cited the injury that would be done to the mill race by the construction of the proposed highway"; that the appellant conferred with other property owners who would be affected, and joined in a petition by twenty-six out of thirty-one property owners in

seeking a hearing before the State Highway Commission "on the question of improving the existing roadbed without blighting said mill property and other properties in the neighborhood" (R. 25, No. 829); that when the appellant and the other property owners appeared before the Chief Engineer and other highway officials at Richmond they "repeated the request for a survey and plat to show what could be done to lighten up the curvature on the existing road," and that the appellant "explained to said highway officials the methods used in operating said grist mill and stated to them that the construction of the proposed road through the mill race and through the hill adjoining the mill race would materially and seriously impair if not stop altogether the operation of said mill for the reasons hereinabove stated"; that the appellant stated to the highway officials "that it would be unlawful to so impair or stop the operation of the mill by the construction of the proposed road"; and that "said officials refused to grant such request and treated lightly the contentions of the complainant in regard to the operation of said mill" (R. 26, No. 829). It was also alleged and admitted that directly thereafter the appellant and the other property owners conferred with local counsel for the appellee "and after discussing the legal questions with him, and the effect of the proposed highway on the operation of said mill, complainant again requested that a survey of the existing road be made, or that in any event the construction of the proposed road through complainant's property be postponed until the complainant could have time to prepare for a suit to enjoin said construction"; that on the next two days similar requests were made to the Senior Highway Engineer, T. W. Ross, and that the requests were refused and the refusal was followed by immediate seizure of the land (R. 27, No. 829); that an acceptable highway could be built on the existing road in front of the mill without affecting its operation, but

that the appellee's engineers refused to make a survey and plat of the existing highway to see what could be done (R. 28, No. 829). The Court concluded that the allegations did not show that the appellee acted arbitrarily in relocating the highway, but the Court did not hold that the appellee did not act arbitrarily in failing to suggest that he would undertake to keep the pipes clear under the relocated highway (R. 34, No. 829). There are no allegations in the bill to justify the contention that the appellant was primarily interested in keeping the road in front of the mill as a protection to his property as a whole, and that the mill question was only incidental, and that this was the reason the appellee did not suggest that he would keep the water flowing under the relocated highway.

The appellee may contend that the appellant's opposition and criticism prevented or excused the appellee from making any proposal for maintaining the flow of water under the highway. This contention is implied in the cross-examination of the appellant before the commissioners, as follows:

"Q. Mr. Bailey, you refused absolutely to permit the road to go through your property, and you refused absolutely to make any settlement whatever with the Highway people?

A. I did.

Q. And you did everything in the world you could to prevent them from putting the road through?

A. I did, and not only I did, but other property owners with me.

Q. And you did not try to work out any proposition with them with reference to the construction of the road or in reference to your land whatever?

A. No, sir. We protested against the construction of that highway all the way through, because we knew that it would blight all that property" (R. 26).

From this line of questioning it will be observed that the appellee's conception of fairness, and of the property owner's duty, was that while the appellee had the appellant and his property under the stringent control of the statute, which authorized the appellee to withhold the judicial process for ascertaining compensation and damages while he was trying to "work out" a "settlement" with the appellant, the latter was under a duty to make a settlement, and to try to work out a "proposition" with the appellee with reference to the construction of the road over the mill race, which obviously would have involved a reduction in the amount that the appellee offered while he had the appellant under restraint and the appellant's property under control. The appellee did not need the appellant's aid to enable him to undertake to keep the pipes clear under the highway. What he wanted was a "settlement" and the appellant's consent to a "proposition" to reduce the amount of money he would get in order to keep the mill in operation without having to submit the matter to the commissioners in the condemnation proceedings. The appellant contends that he was under no duty whatever to yield to the autocratic statutory pressure which the appellee exerted against him.

It is true that by keeping the highway off the mill race the appellant's residential property and the properties of others would not have been blighted by the new highway. That circumstance did not make it unreasonable for the appellant to try to keep the highway off the mill race so that it would not obstruct the water and prevent the operation of the mill. The question is whether the appellant was reasonable in trying to save the water power, not whether he would receive any other benefits; otherwise the right to protect a grist mill would depend upon whether the miller owned any other property adjacent to the mill. The appellee's duty to avoid delay by promptly disclosing his willingness to remove obstructions in the mill race was not less

because the appellant would have received a greater benefit to the mill if the highway had been left in front of the mill, or because the appellant desired also a different benefit from that accruing to the mill, or because the appellant opposed the highway plan of the Commonwealth of Virginia.

Because the appellant made an "assault" on state policy is no reason for the appellee to stand on the doctrine that "Those who take the sword sometimes perish by it." [122] Vigorous and determined opposition to state policy, unaccompanied by actual obstruction of state action, does not justify delay caused by the aloofness and pressure of a state official. "What is fair in one set of circumstances may be an act of tyranny in others." [123] Nothing could be more tyrannous than the arbitrary withholding of a solution by a state official while he clutches a property owner with an oppressive statutory power.

e. Sovereign Immunity Not Applicable to Just Compensation

The argument that the state is not liable for the neglect of a state official is ineffective in determining whether the state is liable for just compensation. The argument would be applicable if the appellant claimed damages for the expense incurred in conducting the equity suit through the trial and appellate courts, but the claim is for interest on the amount awarded as damages in the condemnation proceedings. Since the neglect of administrative officials prevents the sovereign from recovering interest,[124] it should also prevent the sovereign from escaping the payment of interest as a part of just compensation.

The Commonwealth of Virginia has had the use of the money. The appellee's undertaking to keep the pipes clear

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[122] Cf. *Davis* v. *Com.*, 182 Va. 760, 768 (dissenting opinion of Mr. Justice Holt).

[123] *Snyder* v. *Mass.*, 291 U. S. 97, 117.

[124] *Jackson County* v. *U. S.*, 308 U. S. 343.

resulted in a direct benefit to the Commonwealth in that the claim for damages for injuries to the operation of the mill was withdrawn so that the commissioners did not consider the question of injury to the mill as an element in determining damages to be recovered for injury to the residue of the appellant's property (R. 19, 20). To allow the Commonwealth to retain this benefit and to escape payment of interest covering the delay caused by the appellee's neglect to offer his undertaking at the proper time would be conferring a double benefit. It is unjust to allow the Commonwealth to profit by the appellee's undertaking and also to profit by his failure to undertake at the proper time. By allowing the Commonwealth this unjust enrichment, the ruling of the Court was gross and obvious. The appellant contends that the equitable position of the Commonwealth is analogous to that of the cestui in *Stone* v. *White*, 301 U. S. 532; and that the principle of that decision is sufficient ground for requiring the Commonwealth to pay interest in order to prevent a double benefit.

D. Admission of Delay in Instituting Condemnation Proceedings

The appellee has admitted that the delay of one year and eight months beginning with the excavations started on October 16, 1941, and ending on June 17, 1943, when condemnation proceedings were instituted, was caused by him (R. 6, 7). A positive admission was made by the Attorney General in the statement upon which the Court in the equity suit relied in denying the appellant the right to attack the statute (R. 36, No. 829). He said: "At the instance of the landowner, the appellant in this case, action in the condemnation proceedings has been held up by the lower court pending a decision in this case * * * it is to be noted that the postponement of the actual acquisition of title to

the land is no longer due to the action of the State Highway Commissioner, but to the action of the appellant." [125]

In the appellee's motion to strike, filed in the condemnation proceedings (R. 9), he stated that "a substantial part" of the delay was caused by the appellant "in insisting that the condemnation proceedings be delayed until the termination of the injunction suit," thus admitting by implication that the delay prior to the institution of the proceedings was caused by the appellee.

E. Delay by Consent Pending Appeal in Equity Suit

The appellee agreed to the delay from the time he instituted the proceedings until March, 1944, a period of nine months.[126] The agreement is evidenced by the Court's statement that "By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right of the State Highway Commissioner to condemn the property in question" (R. 36, 37, No. 829). There was no agreement or implied understanding that interest would not be paid or that whether interest would be paid depended upon the outcome of the appeal in the equity suit.[127] If the appellant had forced the appellee to wait until the appeal was completed, as the appellee forced the appellant to wait until the condemnation proceedings were filed, the appellant would not be entitled to interest for the nine months fol-

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[125] The Attorney General's statement is shown in the Appendix to the Brief in support of the Petition for Certiorari, No. 829, p. 68. "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced." *Best* v. *Dist. of Columbia*, 291 U. S. 411, 415.

[126] In March, 1944, the appellee moved to have commissioners appointed in the condemnation proceedings while the appellant sought a review by this Court of the decision in the equity suit (R. 3, 4).

[127] The Court does not "presume acquiescence in the loss of fundamental rights." *Ohio Bell T. Co.* v. *P. U. C. of Ohio*, 301 U. S. 292, 307.

lowing the institution of proceedings. The appellee was not forced to consent. He elected to wait and to withhold and use the money in the meantime. Obviously his purpose in consenting to wait was to build up the argument that he had instituted the proceedings but that he was unable to proceed any further because the Court below, "at the instance of the landowner, the appellant in this case," had held up the proceedings pending the appeal in the equity suit, and that for this reason the appellant was not entitled to attack the statute. There is nothing in the record to support the view that it was because of the appellant's "insistence" that the Court held up the condemnation proceedings, or that the appellee did not consent to the delay. The Court stated that the delay was by "consent of both sides" (R. 36, No. 829). Under these circumstances, there was no ground for denying interest.[128] The denial was gross and obvious.

F. Period in Which Condemnation Proceedings Were Active

There is not the remotest reason for denying interest during the period of approximately four months in which the condemnation proceedings were carried on, that is, from April 22, 1944, when the appellant's plea was filed (R. 4), until August 11, 1944, the date of the final decree (R. 33). This period of time was required for the pleadings, argument, hearing, and the preparation and entry of the decree in the condemnation proceedings, and it has never been contended by the appellee that the appellant was responsible for that delay or that the appellant should not have interest for that period of time. The denial of interest for this period reflects an incredible disregard of the plain

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[128] *Drury* v. *Midland R. Co.*, 127 Mass. 531; *Bloom, S. & G.* v. *Mitchell*, 289 Mass. 376; *Borst* v. *Young*, 302 Mass. 124; *Phila., etc. R. Co.* v. *Gesner*, 20 Pa. 240; *Sel., etc. R. Co.* v. *Burson*, 61 Pa. 369.

rights of a property owner to be free to file his pleading in condemnation proceedings after his property has been mutilated, and to have his compensation claims adjudicated without being penalized. The denial was arbitrary.

G. Payment of Interest, Notwithstanding Deposits

The deposit made by the appellee under the statute assailed (R. 27, No. 829) was not effective to stop interest on the amount deposited, if the statute is held to be unconstitutional;[129] and the deposit made on August 19, 1944, pursuant to the order of the Court, was not effective to stop interest if in this appeal the appellant is successful.[130]

IV. Conclusion

Invalidity of Statute, and Compensation for Use

Under the due process clause of the Fourteenth Amendment, the invalidity of the statute assailed derives from the procedural control which enabled the appellee to have the compensation and damages determined by an unfair view of the appellant's property. Since the statute was invalid from the beginning, the use of the property for highway purposes was unauthorized, and since the use was accomplished in the face of warnings of invalidity, and in conscious disregard of the appellant's constitutional rights, with resulting benefit to the state, the appellant is entitled to compensation for the rental value of the property for highway purposes. The denial of compensation on that basis operated to deprive him of his property without due process of law contrary to the Fourteenth Amendment, but

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[129] *Norton* v. *Shelby County*, *supra*.

[130] *Schnull* v. *Indianapolis U. R. Co.*, 190 Ind. 572.

aside from that he is entitled to compensation on that basis under the Virginia decisions if the statute is void ab initio.

Interest

The denial of interest was in violation of the due process clause of the Fourteenth Amendment because interest on the damages awarded is a part of just compensation, and the denial was gross and obvious. The delay in payment was caused by the appellee, and the appellant had no power to prevent the delay. The statute assailed furnished the opportunity to delay payment. The delay is divided into four parts, (1) the period of twenty months prior to instituting condemnation proceedings (R. 7); (2) the period of approximately nine months pending the appeal in the appellant's equity suit, and before the appellee applied for the appointment of commissioners in the condemnation proceedings (R. 1, 3); (3) the period of approximately four months while the condemnation proceedings were active (R. 4-37); and (4) the period from the final decree in the condemnation proceedings (R. 33) until payment is received.

If it had not been for the statute, the appellant could have compelled the appellee to institute condemnation proceedings immediately, and in that case the appellant would have been in a position to negotiate with the appellee on an equal basis. As it was, the appellee had the advantage since under the statute he controlled the time for instituting proceedings to determine the damages. If the appellant had offered to waive damage to the mill in consideration of the appellee's undertaking to preserve the water power that would not have caused the appellee to institute the proceedings any sooner since the appellee contended that he was waiting for the highway to be completed before in-

stituting the proceedings, as shown by the Court's statement that "the highway has been completed and condemnation proceedings to acquire title to the appellant's property have been instituted." (182 Va. 70, 75; R. 36, No. 829.) To obtain a settlement of the mill question before the condemnation proceedings were instituted, the appellant would have had to accept a reduction in the amount which the appellee offered. If the control established by the statute is a sufficient reason for invalidating the statute, it is a sufficient reason also for rejecting the contention that the appellant was responsible for the delay in instituting the condemnation proceedings. The delay of twenty months before the condemnation proceedings were instituted by the appellee would have been avoided if the appellee, instead of relying upon his statutory control and sovereign status, had promptly instituted condemnation proceedings and had promptly offered to preserve the water power. The appellant's equity suit did not prevent the appellee from instituting condemnation proceedings promptly, and it did not prevent him from undertaking promptly to preserve the water power. The only reason the appellee can advance for not instituting condemnation proceedings promptly is that he waited until he completed the highway, but that is no reason for denying interest. The only reason he can advance for not undertaking promptly to preserve the water power is that his sovereign position is on the highest level, where subordinate duties are excluded, which is a perversion of the doctrine of sovereign immunity, as well as an insufficient reason for denying interest.

The appellant was in a position to negotiate freely when the appellee instituted the condemnation proceedings, but at that time the appeal in the appellant's equity suit had been pending for several months (R. 21, 31, 32, No. 829). By consent of both sides, the condemnation proceedings

were delayed for approximately nine months to await the decision on the appeal in the equity suit (182 Va. 70, 75; R. 36, No. 829) on questions that never would have been litigated had the appellee instituted condemnation proceedings promptly and had he undertaken promptly to preserve the water power. Interest was not waived by the consent. That the appeal in the equity suit terminated in the appellee's favor is no reason for denying interest, because the consent to delay did not include an agreement that interest would not be paid if the equity suit terminated in the appellee's favor. If the condemnation proceedings had been delayed by Court order over the appellee's objection the delay for nine months would be chargeable to the appellant. The appellee, as well as the state, received a benefit from instituting condemnation proceedings, and then consenting to delay the proceedings, because his strategy enabled him to obtain a decision by which the constitutional question was avoided in the equity suit (182 Va. 70, 75, 76; R. 36, 37, No. 829).

When the time came for the commissioners to assess the damages the appellant was then in a position to bargain with the appellee without being harassed by his statutory control. The appellee became flexible in his attitude, and agreed to preserve the water power in consideration of the appelant's withholding from the commissioners the question of damage to the mill (R. 19, 20). The state has had the use of the money, and has received a benefit from the appellee's belated undertaking to preserve the water power because the mill question was not submitted to the commissioners. It should not be allowed to accept the benefit and to escape the payment of interest on the money it has used.

The appellant is entitled to interest also for the period of approximately four months during which the condemna-

tion proceedings were active, and also for the period from the final decree in the condemnation proceedings until payment is received. The deposit made when the property was seized is ineffective to stop interest because it was based upon the statute assailed. The deposit made after the final decree (R. 37) is ineffective to stop interest if the appellant is successful in this appeal.

Respectfully submitted,

BERNARD B. BAILEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

REPLY BRIEF FOR APPELLANT

BERNARD B. BAILEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

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vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

REPLY BRIEF FOR APPELLANT

Summary of Argument

This appeal should not be dismissed for want of a properly presented substantial Federal question.

1. The hearing afforded by the statute assailed did not meet the requirements of due process. The appellant's participation in the hearing did not satisfy those requirements, or estop the appellant from assailing the statute.

2. First and second assignments of error. The appellant has never contended, and in order to assail the statute it is not necessary to show that due process requires a viewing of the property either before or after the construction of the highway. That due process does not require a view is no ground for the contention that it was not tortious or unlawful for the appellee to mutilate and disfigure the property

while he arbitrarily and willfully held off the viewing of the property, and forced the appellant to accept a false view.

3. Third assignment of error. There is no authority for the view that the Virginia practice is that where the land is taken and used before the award, the award itself includes all interest and damages to which the landowner is entitled up to the time of its rendition. The test is whether the commissioners were authorized to award all interest and damages to which the landowner is entitled, and if the authority exists the test then is whether they indicated in their award that they did not award all interest and damages to which the landowner is entitled. On the basis of these tests, the commissioners did not award any interest, and they did not award any damages beyond the damages for injury to the residue.

That the appellant did not request any specific instructions to be given to the commissioners by the Court on the subject of interest is irrelevant because the question of interest was not submitted to them.

The record of the proceedings in the Circuit Court properly presents the question of interest raised by the appellant. The law of Virginia does not presume that interest is included in the award where, as in this case, the commissioners are not authorized to award interest and indicate plainly in their award that they did not do so.

The due process clause of the Fourteenth Amendment requires that in the taking of land by eminent domain damages must be paid for injuries to the residue. The fact that such damages are recoverable under the Virginia Constitution does not affect the security of the Fourteenth Amendment, and has no bearing whatever upon this appeal.

Argument

This appeal should not be dismissed for want of a properly presented Federal question.

I

General Statement of Requirements of Due Process

Whether the statute assailed violates the due process clause of the Fourteenth Amendment, as contended by the appellant, is a question that can not be disposed of by simply saying that it provides "fair and adequate machinery for ascertaining the compensation and amount of damages" (Appellee's brief, p. 7). The appellee does not attempt to show why it is fair and adequate, and he does not even mention the oppressive and unconstitutional procedural control which the statute vests in him. If, as the appellant contends, the statute violates the Fourteenth Amendment for the reasons given (Appellant's Brief, pp. 18-34) the cases cited by the appellee (p. 7, footnote 1) are wholly irrelevant. If the statute violates the Fourteenth Amendment, the invalidity can not be overcome by saying that the Fourteenth Amendment does not insure immunity from judicial error, or that while the procedure required by the statute is not as desirable as this Court would have it, yet the State of Virginia is to determine what the procedure should be. In determining whether the statute violates the Fourteenth Amendment, the test is not whether there has been a judicial error reviewable by this Court. The test is whether the legislature has violated the Fourteenth Amendment in enacting the statute. In determining whether the procedural control authorized by the statute deprived the appellant of a fundamental right the question is not whether the procedural control is less desirable than some other system of control. The Fourteenth Amendment

does not permit any type of control that operates to deprive one of fundamental rights. The Court would not be justified in ignoring the procedural control on the ground that the Court believes that a more desirable procedure would be to eliminate the procedural control.

The appellee implies that because the appellant "actively participated in said hearing" (Appellee's brief, p. 5) and "makes no charge of any misconduct" (p. 8), the appellant can not assail the procedural control vested in the appellee by the statute. This is not a case of estoppel by voluntary submission to the unconstitutional procedure of the statute. If the statute had authorized the appellant to insist that the property be viewed before disfigurement, or that no view be made after the disfigurement, he would not be in a position to complain. Acting under the statute, the appellee forced the appellant to wait until after the disfigurement before the view was made, and the appellant had no power whatever, and the Court had no power, to prevent the view. If the appellee had contended that the compensation and damages should be assessed without a view, the Court could not have upheld the contention. The appellant did not contend that the statute is invalid because it requires a view. He contended that the statute is invalid because it enables the appellee to control the time for viewing the property, and that the appellee forced the appellant into the position of having the property viewed at a time when it was impossible for the viewers to see the property in its original condition. Estoppel, an equitable doctrine, is not for the benefit of one who is guilty of wrongful or inequitable conduct. Estoppel is allowed to prevent injustice, and it is essential that one who claims estoppel should have proceeded in good faith. Acts induced by his own conduct can not furnish the basis for an estoppel.[1] The appellant's

[1] 31 C. J. S., p. 281, section 75; *R. H. Stearns Co. v. United States*, 291 U. S. 54, 61, 62.

"acceptance" of the false view was not simply induced by the appellee—it was forced by him. There can be no estoppel where the party claiming it has knowledge of the illegality of his acts, or where the assent is to acts which one is powerless to prevent.[2] To estop the appellant would mean that after he had been forced into the position of having a false view made of the property he should have stayed away from the viewing and hearing and should have insisted upon a hearing without a view, and then if successful in overthrowing the statute the appellant could have had a hearing without any viewing of the property at all. That would mean that the appellant would have to wait more than four years after the property was taken before a hearing, and would incur the difficulty of producing evidence and witnesses to prove in 1945, or 1946, what the property was worth in 1941 before the appellee began to operate his statutory control. The appellee is not in a position to claim estoppel by the appellant's "acceptance" of conditions which the appellee created and where the rejection of the conditions would place upon the appellant additional difficulty, expense and risk.

That the amount awarded greatly exceeded what the appellee's counsel in the Circuit Court thought fair is wholly irrelevant and the contention is presumptuous. It is irrelevant that the Virginia Court pronounced the judgment plainly right. The Virginia Court did not pass upon the amount of the award, and even if it had done so, it would have no bearing upon the validity of the statute.

The appellant did not accept any "benefit" under the statute. He contended that he lost a benefit by being forced to have the assessment made on the basis of a false view, and that the statute is invalid on that ground. Both the Circuit Court and the highest Virginia Court held that he

[2] 31 C. J. S., p. 365, section 114.

lost a benefit because by upholding the statute they necessarily held that the appellant had lost the benefit and was entitled to attack the statute. The appellee has not been prejudiced or misled by anything the appellant did. His argument is purely technical and inequitable.[3] It is no stronger than the sordid reasoning of one who overpowers his victim and then seeks to escape responsibility by saying that his victim did not object or try to escape.

II

First and Second Assignments of Error

That the commissioners in viewing the property "would have the same or perhaps greater difficulty in visualizing beforehand the changed conditions which will result from the improvements contemplated" (Appellee's brief, p. 8) is no reason for saying that the appellee should be allowed to hold off the viewing of the property until after he has finished his mutilation and disfigurement, and then force the owner to have the property viewed to determine its original value; and yet that is the sum and substance of the appellee's argument. To uphold it would be to approve spoliation as a means of conferring a benefit upon the state. That the state has not provided a procedure that is fair and inequitable is no reason for preventing the appellant from contesting a procedural control that is unfair to him. It is obviously impossible for viewers to visualize the property in its original condition after it has been mutilated and disfigured by the removal of part of the property and by changing and covering up another part. The viewers did not look at blue prints. They looked at the property itself in its changed condition. If the appellee's argument is sound then there would be no objec-

[3] *Ashwander* v. *T. V. A., etc.*, 297 U. S. 288, 323.

tion if the statute gave to the owner the exclusive right to have the property viewed before or after the disfigurement. This is not a case in which the statute provides that the compensation and damages shall be assessed on the basis of blue prints and testimony after the highway has been completed. The State of Virginia is not satisfied with a statute of that kind because it would not give the appellee the procedural control which enables him to manipulate, negotiate, mutilate and disfigure, all at the same time,—a combination of powers operating to beat down the demands of landowners.

The Federal statute (U. S. Code, sec. 258a) furnishes no analogy because the proceedings are instituted before the mutilation is commenced, the owner is not held back, and the property is not viewed. It is incredible that argument would be advanced that the appellee is entitled to control the procedure for viewing the property after disfigurement because Section 258a has been upheld, or because of the language in *A. Backus & Sons* v. *Fort Street Depot Co.*, and in *Bragg* v. *Weaver* (appellee's brief, pp. 9, 10) which did not involve the control by the state of the viewing of the property. The appellee has simply raised a false issue, because the appellant has never contended that a taking and mutilation before assessment of compensation and damages would be unconstitutional. In *Bragg* v. *Weaver*, the Court emphasized the point that the owner was free to act on his own motion, a strong indication that control by the state is objectionable.

The statement that the Supreme Court of Appeals in the equity suit held that the statute assailed is not in violation of the due process clause (Appellee's brief, p. 11) is a bold assertion, contrary to the express words of the Court, viz., "We find it unnecessary to pass upon this contention" (182 Va. 70, 75, 76). The decision in that case is not res judicata in this proceeding, and it is not

the law of this case. Even if it had been, both the Circuit Court and the Supreme Court of Appeals in this proceeding ignored the decision in the equity suit because they expressly held in this proceeding that the statute is not in violation of the due process clause of the Fourteenth Amendment (R. 12, 41, 42). That express holding shows that both Courts ruled that the equity suit is not res judicata, and the appellee has not appealed from the ruling.

The appellee implies that the appellant can not attack the statute because he failed to set up his objection in the equity suit (Appellee's brief, p. 11). The appellee is inconsistent. In the equity suit the appellee contended in his demurrer that the appellant advanced prematurely his objection, that the filing of proceedings could be delayed, because the appellant could not show that there had been any delay (R. 31, No. 829). Now the appellee contends that the appellant was too late in advancing his second objection, concerning the appellee's mutilation of the property while delaying the view, because the appellant "knew the highway was being constructed and that original conditions would be changed" (Appellee's brief, p. 11). The appellee ignores the point that the appellant's second objection related, not to the mutilation of the property alone, but to the mutilation coupled with the appellee's arbitrary withholding of the viewing of the property by the commissioners. If the appellant was not in a position in the equity suit to object to the delay because he could not show delay in filing the proceedings, he was also not in a position to object to the withholding of the view because he could not show a withholding of the view until he could show delay in filing the proceedings. Besides, the appellee knew the highway was being constructed and that original conditions would be changed before the commissioners could view the property, so that he was not prejudiced or misled by the

fact that the appellant did not raise the objection when he filed his equity suit. A complete answer to the appellee's argument is that he made the contention of res judicata in his motion to strike (R. 19) in this proceeding, and the contention was rejected by the Circuit Court (R. 12). The appellee did not appeal from that ruling, and he is not in a position to make the same contention now.

The appellee contends that the appellant has already received compensation for the use of the property in the form of interest which is included in the award of the commissioners (Appellee's brief, p. 12). This contention is groundless. It is based upon pure conjecture. It ignores the plain evidence in the record that the commissioners were not authorized to award interest, and that they clearly indicated in their award that they did not do so. (For the appellant's answer to this contention, see below under IV. Question as to Interest Included in Award.)

III

Third Assignment of Error

Here the appellee again advances the groundless contention that the commissioners included in their award interest on the damages (Appellee's brief, pp. 12-15). (The appellant's answer to this contention is set forth below under IV. Question as to Interest Included in Award.)

The appellee makes the startling contention that insofar as the due process clause of the Fourteenth Amendment is concerned the State of Virginia could have paid the appellant the $1,500 awarded for the land taken without paying the $6,500 awarded for the damage to the residue of the appellant's property, and that the only reason the appellant is entitled to the $6,500 is that the State of Virginia, as a matter of generosity, has provided for the payment of damages to the residue (Appellee's brief, pp. 16,

17). He contends also that the Fifth Amendment does not require the United States to compensate the owner for "damages caused to his other lands" (ibid). The appellee ignores the appellant's contention that compensation for damage to the residue is required by fundamental justice, and that compensation required by fundamental justice is required by the Fourteenth Amendment. He ignores the decisions cited in the appellant's brief to support the appellant's contention. (See cases cited on pages 69, 70, and 71, in footnotes 88-96 of appellant's brief *Mitchell v. United States*, 276 U. S. 341, cited by appellee (p. 16) does not state a contrary view. There the owner claimed damages for destroying his "business," not damages to the residue of his land. There was no residue, because all of his land was taken. The case of *Chicago* v. *Taylor*, 125 U. S. 161, cited by the appellee (p. 16) is not in point because no claim was made that the Fourteenth Amendment requires payment of compensation for injury to the residue.

The reference to state constitutional provisions allowing compensation for "consequential" damages (Appellee's brief, pp. 16, 17) has no bearing upon the Fourteenth Amendment. The provisions for consequential damages amplify the coverage of the compensation mandates in the state constitutions. Due process does not need any such amplification to cover injuries to the residue. While due process does not protect against injuries to the residue that are insignificant or common to all owners affected by the public improvement, it is because the injuries are not compensable under the principles of fundamental justice, not because they are "consequential." The "consequential" test has reference, not to the extent or character of the injury, but to the manner in which the injury is inflicted, which is a significant feature of the compensation mandate but not of the due process security. It is wholly irrelevant to say that the Supreme Court of Appeals has

held that the appellant has received just compensation for the damages to the residue within the meaning of the Virginia Constitution, and that this Court must accept the decision of the Virginia Court (Appellee's brief, p. 17). The appellee does not dispute the point that if the due process security of the Fourteenth Amendment requires payment of compensation for injury to the residue of appellant's property, it requires also the payment of interest on such compensation (ibid), which is the appellant's contention (Appellant's brief, pp. 71-74).

IV

Question as to Interest Included in Award

The appellee seeks to avoid the vital issues of this controversy by relying upon the principle that this Court will not interfere with state practice. He argues that under the Virginia practice interest was included in the award and that consequently no federal question is presented. By this legerdemain he seeks to avoid not only the question of interest on the damages awarded but also the question concerning the statute assailed. In his struggling attempt to establish a Virginia "practice," the appellee proceeds "without reference to any evidence, upon proofs drawn from the clouds" (*Ohio Bell Tel. Co.* v. *Public Utilities Com. of Ohio,* 301 U. S. 292, 307). He states that the practice in Virginia is for the commissioners to include in their award "the amount of all damages sustained up to the time of their award, or in some cases up to three months thereafter" (p. 12). The only authority he has for that "practice" is *City of Richmond* v. *Goodwyn,* 132 Va. 442, which involved the Virginia statute on street widening and grading, and which has no reference whatever to the procedure under the statute assailed in this case. The *Goodwyn* case did not involve the taking of land before

the determination of compensation and damages. Condemnation proceedings were instituted, and commissioners were appointed, before the city took possession of the land. The commissioners' report was filed on October 23, 1920. The statute provided that the city could have three months after the date of the report in which to decide whether to take the property at the valuation fixed by the commissioners. After the report was filed, the city neglected to make a payment or deposit of the amount awarded, and on April 26, 1921, the owner moved to vacate the proceeding. The city then made a deposit of the amount awarded. The owner would not accept it, and claimed interest on the award from the date of the filing of the report until the time of the deposit, and interest at a different rate from that time until payment. The city did not take possession of the land. The case did not involve the question of payment of interest as compensation for the use of the land. The only question was whether interest should be paid on the award for the time between the date of the award and the date on which the city made its decision to take possession of the property. In stating that the commissioners "are presumed to have allowed for the inconveniences, damage and delay arising out of the proceedings, certainly to the date of the filing of their report, and for three months thereafter" (112 S. E. 787, 791), the Court had no reference whatever to interest or compensation for the use of the property. The Court simply meant that the commissioners in making their report were presumed to have allowed for any damage caused by the delay of the city in deciding whether to take the property at the valuation fixed by the report.

The case of *Export Leaf Tobacco Co.* v. *City of Richmond*, 163 Va. 145, cited by the appellee (p. 13), does not have the slightest bearing upon the question of interest or compensation for the use of the property. The city in-

stituted proceedings to determine the damage to the defendant's property by the grading of a street. On January 23, 1931, an order was entered awarding $30,000. On June 24, 1932, the city advised the defendant that it was ready to pay the amount awarded, but the defendant claimed interest on the amount awarded from January 23, 1931, the date of the award. Upon the city's refusal to pay interest, the owner sued for judgment in the sum of $30,000 and interest thereon from January 23, 1931. The work of grading the street was not completed until August 30, 1932, and prior to that time the owner was not interrupted in the use of his property. Therefore, there was no question in the case as to the use of the property by the city. The Court said that because of Section 3039 of the Code the amount awarded as compensation had the effect of a judgment (175 S. E. 753, 755), and that the right to the award begins as soon as the street grade is established pursuant to the statute, and the award having the effect of a judgment bears interest from the date the award becomes final (175 S. E. 753, 757). One will search in vain for any evidence in this case upon which to base any "practice" in Virginia.

To overcome the weakness of this showing of the Virginia "practice," the appellee turns to the "practice" in West Virginia, Massachusetts, and Oklahoma, to reinforce his theory of what the practice is or should be in Virginia. The first precedent is *State* v. *Painter*, 120 W. Va. 486. To make this case appear as a reflection of the Virginia practice, the appellee states that the West Virginia statutory proceedings are "quite similar" to those in Virginia, but he fails to point out all of the differences. He also fails to quote passages from the decision in which the Court outlines the conditions under which the Court may add interest to the verdict. The Virginia statute, Section 1969j (2) of the Code, requires the commissioners to ascertain what will be a just compensation "for the land or other

property, or for the interest or estate therein, proposed to be condemned * * * and to award the damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of the highway * * *" It provides that the commissioners "shall fix the value of the land taken and the damages, if any, which may accrue to the residue." The West Virginia statute, Section 5380 of the Code, provides on the other hand that the commissioners shall ascertain what will be a "just compensation to the person entitled thereto" for the land taken, and for damage to the residue. The West Virginia statute does not say that the commissioners shall "fix the value of the land taken," as the Virginia statute requires. Section 5381 of the West Virginia Code provides that after the commissioners' report either party may demand that the question of "the compensation to be paid" be ascertained by a jury, and that the cause shall be tried "as other causes" in the court and that the jury, ascertaining the damage or compensation "to which the owner of the land proposed to be taken is entitled," shall be governed by Section 5380. Obviously, the statutes and the procedures of the two states are entirely different, and there is nothing to support the appellee's assertion that the proceedings are "quite similar." The dissimilarity is adroitly evaded by the appellee. He has resorted to an adumbration of the procedures in the two states in an effort to convince the Court that the appellant's appeal should be dismissed for the lack of a properly presented substantial federal question. Instead, the Court should dismiss his argument for the reason that he has improperly and disingenuously presented a superficial and an unsubstantial analogy between the two procedures. The Virginia statute confines the commissioners' award to "the value of the land taken" and the damages to the residue, while the West Virginia statute allows the commissioners to determine the "just

compensation to the person entitled thereto . . . ," and provides that the jury may ascertain the damage or compensation "to which the owner" is entitled. A practice followed in determining just compensation to the owner is not a proper precedent for a practice in determining the value of the land.

The Massachusetts procedure is not in point at all. In *Minot* v. *Boston*, 201 Mass. 10, cited by the appellee (pp. 14, 15) the Court pointed out plainly that in that state the jury constitutes the only tribunal to determine the damages and that "it was not only in their power, but it was their duty, to fix the amount due" (201 Mass. 10, 12). The Court instructed the jury that the measure of damages was "the fair value of the land taken upon the whole evidence" (ibid). In Oklahoma, as shown in *Blackwell* v. *Bebout*, 19 Okla. 63 (Appellee's brief, p. 14), it is the duty of the jury "to assess the entire damages" (91 P. 877, 882). The practice there has no bearing at all upon the Virginia practice.

In all of these cases the juries were not only clearly authorized and under a duty to determine the entire amount to which the owner was entitled, embracing the value of the land, the damages and interest, but the verdicts were of a general nature, and there was nothing to indicate that they confined their awards to the value of the land or to the fee simple title to the land, and there was nothing to indicate that they did not consider compensation for the use of the land. In *State* v. *Painter*, the commissioners reported the sum of $1,100 as just compensation for the land taken, but the jury in rendering a general verdict "found in favor of the condemnee in the amount of $1,700" (199 S. E. 372, 373). In *Minot* v. *Boston*, the jury rendered their verdict "upon the whole evidence," and it is not indicated that they restricted their verdict to the land and did not

consider the use thereof (201 Mass. 10, 12). In *Blackwell* v. *Bebout*, the jury rendered a general verdict for damages (91 P. 877, 882).

Thus the question is determined, not by the state "practice," but by considering (1) the authority of the commissioners or jury derived from the statute, or from the oath taken, or from the instructions, and (2) the recitals in the report or verdict.

In *Moll* v. *Sanitary District*, 228 Ill. 633, cited by the appellant (pages 45, and 73 of brief) the Court said that the jury was empaneled, not to assess the value of the property taken or damaged, but in the language of the oath required by the statute to be administered "to well and truly ascertain and report just compensation to the owner of the property which it is sought to take or damage * * * according to the facts in the case as the same may be made to appear by the evidence. (228 Ill. 633, 636). The Court said further: "This just compensation, according to the facts in this case, included not only the value of the property at the time of the filing of the petition, but the use of the property from the time the petitioners took possession, measured by the interest for that time on the value of the property as found by the jury" (ibid).

The Court has ample authority to add interest to the amount awarded where the authority of the commissioners to include interest is withheld, or where it is indicated that they confined their award to the value of the land or of the fee simple title. In *State* v. *Painter*, the Court said: "Where, in a condemnation proceeding, the property is actually taken before the verdict, the trial court, applying the rule of the *Simms* case, would have the right to add interest to the amount of the verdict, provided that the record discloses that the jury allowed no interest or where the court, by instruction, reserved the question of interest until after the verdict, and the dates between which interest

should run are so reasonably ascertainable from the record that the court could make the computation and render judgment for the aggregate amount of the verdict and interest. *St. Louis, El Reno & Western Ry. Co.* v. *Oliver*, 17 Okla. 589, 87 P. 423, 10 Ann. Cas. 748; *Blackwell, Enid & Southwestern Railway Co.* v. *Bebout*, 19 Okla. 63, 91 P. 877, 14 Ann. Cas. 1145; *10 Ruling Case Law*, 144 notes 8 and 9; *1 Nichols Eminent Domain*, page 656" (199 S. E. 372, 374).

In *Alloway* v. *Nashville*, 88 Tenn. 510, 13 S. W. 123, quoted with approval by the Virginia Court in *City of Richmond* v. *Goodwyn*, 132 Va. 442, no instruction on the subject of interest was given or requested. After verdict, and before judgment, the owner moved the Court to add interest, which was refused. On appeal the Court said: "Refusal to allow interest was error. In the language of one of the counsel for appellants: 'If the party in whose favor there is verdict is, as a matter of law, entitled to something additional, the court may allow it.' Inasmuch as the error can be readily corrected here, that will be done, instead of reversing and remanding. This court will render the judgment that should have been rendered below. The land was taken about the 10th of August, 1887; hence judgment will be entered for the amount of the verdict, with interest from that date" (13 S. W. 123, 127).

The appellant contends that it is plainly shown by the order appointing the commissioners and by the oath administered to them that they were confined to a determination of the value of the land taken and the damages to the residue, and that the report of the commissioners clearly indicates that they did not include interest or any other sum as compensation for the use of the property or on the damages for injury to the residue. The commissioners were appointed to "ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for highway

uses, and to award damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of said highway * * *" (R. 13), and the commissioners made oath that they would ascertain "what will be a just compensation for the land or other property of the defendants, or for the interest or estate therein, proposed to be condemned for highway uses, and to award the damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of said highway * * *" (R. 13, 14). Thus the commissioners were expressly restricted to the ascertainment of just compensation for the land and damages to the other property of the appellant. Because of these restrictions contained in the order appointing the commissioners and in the oath administered to them, they had no authority whatever to ascertain what would be just compensation to the appellant "according to the facts" in the case, and without that authority they could not award interest as compensation for the use of the land and as compensation for the delay in payment of the damages.

The appellant contends further that by their report the commissioners disclosed in unmistakable terms that they confined their award to the value of the land and did not award anything for the use of the land by way of interest or otherwise and did not award interest on the damages to the residue. Clearly it can not be presumed that the commissioners violated the oath which was administered to them, and the language of the report must be considered in the light of the oath. The language of the report is as follows: "* * * we are of the opinion and find that for the fee simple title of the Defendant in the 3.98 acres of land, more or less, the sum of $1,500.00 will be a just compensation, and that there was $6,500 damages resulting to the adjacent or other property of the owner from the construction and opera-

tion of said highway * * *" (R. 28, 29). If the commissioners had awarded interest for the use of the land they would not have recited that for the "fee simple title" the sum of $1,500 will be a just compensation. There is no relation between the fee simple title to be acquired by the appellee and the use of the land before acquiring that title. It is pure conjecture to conclude that while the commissioners did not award interest for the use of the land taken, but confined the award to the value of the fee simple title to be acquired, still they awarded interest on the damages to the residue.

The fact that no instructions were given or requested on the subject of interest is simply evidence that neither the Court nor the parties considered that the commissioners were authorized to award interest. The absence of instructions can not operate to authorize the commissioners to include in their award something which by the statute, by the order of appointment, and by the oath, they were not authorized to include. The same observation can be made as to the fact that the commissioners knew when the appellee entered the land, and as to the fact that the commissioners knew when they viewed the land that the appellee had been on the land constructing the highway for many months. Their authority to award interest derives from the order appointing them and from the oath administered to them, not from their knowledge of the facts of the case, and there was nothing in the order or in the oath upon which to base the authority to award interest.

That the appellee's counsel in the trial court considered that interest was not awarded by the commissioners is shown by the language in his exceptions to their award. He stated: "* * * the report valued the 3.98 acres of land, more or less, actually taken for road purposes, at $1,500.00, and the damages resulting to the adjacent or other property of the owner at $6,500" (R. 30). In his

opinion, therefore, the award was for the value of the land, not for the use of the land, and for damages to the property of the appellant, not for the damages to the appellant. It is inconsistent for the appellee to claim now that the award included interest as compensation for use, and it is inconsistent for him to claim that the award included damages to the appellant by way of interest on the damages resulting to the residue of the appellant's property.

That the trial Court considered that interest was not awarded by the commissioners is shown by the fact that the Court did not allow any interest from the date of the report of the commissioners, July 12, 1944 (R. 28), until the date of the final decree, August 11, 1944 (R. 33). If the trial Court had denied interest on the theory that the commissioners' award included interest, the Court would have taken the position that no interest would be added to the award because the award included interest up to the date of the award; but the Court would have allowed interest from the date of the award, just as the Court did in *State* v. *Painter*, 120 W. Va. 486. The Court ruled that the claim for interest from October 15, 1941, until payment, be denied (R. 35). The Court allowed interest from the date of the decree, August 11, 1944 (R. 36), not from the date of the award, July 12, 1944 (R. 28). To say that the award included interest from the date of taking possession, October 15, 1941 (R. 7) until the date of the award, July 12, 1944 (R. 28) is to contradict the ruling of the Court that interest should be added to the award from the date of the decree, August 11, 1944 (R. 36) and not from the date of the award, July 12, 1944 (R. 28).

Since it can not be shown by way of state "practice," or otherwise, that the commissioners or the Court allowed compensation for the use of the property taken for the highway, or any interest on the damages to the residue, for the period of one month from the date of the award,

July 12, 1944 (R. 28) until the date of the decree confirming the award, August 11, 1944 (R. 36), the appellant is entitled to compensation for use and to interest on the damages for that period of time even though the Court should uphold the appellee's contention that because of the state "practice" the award included interest from the date possession was taken until the date of the award. This amount can not be disregarded as too insignificant for the court to consider. The appellant claims compensation of $200 a month for the use of the property, and the interest on the $6,500 would be $32.50. The Court can not be fair and say that the claim of $232.50 is so insignificant that the appellant has not presented a substantial federal question, and that the appeal should be dismissed at the cost of the appellant. The costs will run over $1,000, including the printing of the record and briefs in the state Court and in this Court. If the appeal is dismissed under these circumstances, the inevitable conclusion will be that only those with wealth and large claims can expect to get any relief from the Fourteenth Amendment.

The appellee cites *Danforth* v. *United States*, 308 U. S. 271, to show that the "time for taking other lands does not necessarily control" (Appellee's brief, p. 15). It is not the time of taking other lands, but it is the time the damage is done that controls (*United States* v. *Grizzard*, 219 U. S. 180; *Jacobs* v. *United States*, 290 U. S. 13). The damage to the residue was commenced when the appellee began to excavate with his steam shovels and heavy equipment on the appellant's property and to throw dirt and rocks on the appellant's bottom land and meadow in the construction of the fill across the property, October 15, 1941 (R. 7). To hold that the damage to the residue was not caused until the date of the award would be to ignore the facts of the case.

The false and subtle notion that because of state "practice" the appellant can not present a substantial federal question cheapens and degrades the securities of the Constitution of the United States (Cf. *Snyder* v. *Mass.*, 291 U. S. 97, 122). The appellant has already been victimized by the artificial conduct of the appellee when he thwarted the appellant's attack on the statute, and caused the appellant to suffer great costs and expense, by instituting the condemnation proceedings at the strategic time, after waiting one year and eight months from the time he seized the property, and by that means obtaining a ruling favorable to him (*Bailey* v. *Anderson*, 182 Va. 70; cert. den. 321 U. S. 799). Now the appellee seeks by the same sort of strategy to prevent this Court from considering the second attack on the statute made on a different ground. This Court will not blindly accept the appellee's loose argument without exposing its falsity, and the subtle purpose behind it. To do so would greatly disillusion those who cling to the belief that substantial rights protected by the Fourteenth Amendment can not be frittered away by sophistry, or by the effrontery and indifference of state representatives.

Conclusion

The appeal should not be dismissed for want of a properly presented federal question.

Respectfully submitted,

BERNARD B. BAILEY,

Pro se.

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CLERK

BRIEF OF APPELLEE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY
Appellant

vs.

J. A. ANDERSON, State Highway Commissioner
of Virginia
Appellee

APPEAL FROM THE SUPREME COURT OF
APPEALS OF VIRGINIA

ABRAM P. STAPLES,
Attorney General of Virginia,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY
Appellant

vs.

J. A. ANDERSON, State Highway Commissioner
of Virginia
Appellee

APPEAL FROM THE SUPREME COURT OF
APPEALS OF VIRGINIA

BRIEF OF APPELLEE

STATEMENT

On October 13, 1941, the Appellee, Virginia State Highway Commissioner, pursuant to the provisions of

subsection 4 of section 1969-j of Michie's Virginia Code, after notice to Appellant, deposited in the Circuit Court of Fairfax County the sum of $1,500.00 which he estimated to be the fair value of certain lands of Appellant proposed to be taken in the exercise of the power of eminent domain vested in the Appellee by subsection 1 of said section, said sum deposited including also Appellee's estimate of damage to lands not taken. Two days later Appellee entered upon a part of said land for the purpose of proceeding with the construction of the proposed highway. One week later Appellant instituted a suit in equity in said court to enjoin the taking of his land for highway purposes, raising various constitutional questions. The Supreme Court of Appeals of Virginia affirmed a judgment of said Circuit Court sustaining Appellee's demurrer to the Bill. The questions raised and decided therein are set out in the opinion of the Court, *Bailey* v. *Anderson*, 182 Va. 70. This Court denied Appellant's petition for a writ of certiorari to this judgment. 321 U. S. 799.

This appeal arises out of the condemnation proceedings which were instituted June 17, 1943, by Appellee in the said Circuit Court for the appointment of commissioners to ascertain the just compensation for Appellant's lands involved and to award damages, if any, resulting to his adjacent lands (R. p. 1). On April 22, 1944, Appellant filed his "plea setting up claim for damages" (R. pp. 5-8), and Appellee on May 12, 1944, filed his motion to strike same (R. p. 8). The court sustained the motion as to paragraph 4 of the plea

and overruled same as to all other parts and ordered that the said plea of Appellant be considered as his grounds of defense. Whereupon the court appointed commissioners to ascertain and award compensation and damages to Appellant. The commissioners found that the sum of $1,500.00 (the amount previously deposited in court by Appellee), for the 3-98/100 acres taken was just compensation for said land taken and that the damages to the adjacent and other lands of Appellant amounted to $6,500.00. The commissioners' report was filed on July 12, 1944 (R. p. 28). On July 18, 1944, Appellant filed his exception to said report upon the sole ground that the compensation and damages awarded were "grossly disproportionate to the claims made by the Defendant (Appellant)." (R. p. 29). On July 20, 1944, the Appellee, Highway Commissioner, also filed exceptions to said report upon various grounds, i. e., that the award was grossly excessive and contrary to the preponderance of the evidence; that improper evidence was permitted to be introduced before the commissioners on behalf of Appellant, and proper evidence offered by Appellee was excluded (R. pp. 30-33).

On August 11, 1944, the court confirmed the report over the objections of both Appellant and Appellee, to which they both excepted. The order of confirmation shows that Appellant stated to the court that no claim was being made for interest on the $1,500.00 awarded as compensation for the land taken. The order also denied Appellant's claim for interest from October 15, 1941, to the date of the award on the

$6,500.00 damages awarded him, to which denial Appellant excepted (R. pp. 33-37). On August 22 the Appellee deposited in court the amount of the award with interest from the date of the order, August 11, 1944 (R. p. 37).

To secure a review of this order of the Circuit Court the Appellant applied to the Supreme Court of Appeals of Virginia for a writ of error, his petition containing three assignments of error, which are also here relied upon: First, that the denial to him of interest on the amount awarded as damages from the time of Appellee's entry on the land violated the due process clause of the Fourteenth Amendment; Second, that the Virginia statute under which such entry was made denied him due process, and, Third, that consequently he was entitled under the requirements of due process to compensation by way of rental for the use of his property until the condemnation proceedings were completed (R. p. 39). On November 22, 1944, the Supreme Court of Appeals, "being of opinion that said judgment (of the Circuit Court) is plainly right", entered an order refusing the writ of error and affirming said judgment (R. p. 41).

This appeal is from the aforesaid order of the Supreme Court of Appeals.

SUMMARY OF ARGUMENT

This appeal should be dismissed for want of a properly presented substantial Federal question.

1. The Virginia statute challenged has afforded a fair and impartial hearing to the Appellant in judicial

proceedings to determine the just compensation to which he is entitled for land taken by the State for highway purposes and the damages to other lands owned by him. He actively participated in said hearing and has not been arbitrarily deprived of any legal right. The requirements of due process have been fully met.

2. First and second Assignments of Error—Due process does not require that the commissioners who are to ascertain what is just compensation for land taken and the damages to other lands shall view the premises before the construction thereon of proposed public works. Such preview is not necessary in order to render lawful a taking of such land by the State in the exercise of its power of eminent domain, where reasonable provision is made to assure the payment of just compensation and damages. Appellant's land, having been taken under such circumstances, the State's possession was not tortious or unlawful, and the landowner is not entitled to be paid rental for the land taken pending the ascertainment of just compensation therefor.

3. Third Assessment of Error—Appellant is not entitled to interest upon the amount of the commissioners' award for damages to other lands owned by him between the time Appellee entered upon the land taken and the time of the award. In condemnation proceedings in Virginia the award itself includes all interest and damages to which the landowner is entitled up to the time of its rendition. The order of the Circuit Court provided for future interest on the amount of the award until same was paid.

The Appellant did not request that any specific instruction be given to the commissioners by the court on the subject of including such interest in or excluding same from their award, and he must be held to have acquiesced in the submission to them of the question of past interest in accordance with the general practice.

The record of the proceedings in the Circuit Court, therefore, does not properly present the question raised by him that he has been denied interest on damages to his other lands from the time of Appellee's entry into possession of the land taken until the time of the award. The law of Virginia presumes that such interest is included in the award.

The due process clauses of neither the Fifth nor the Fourteenth Amendment require compensation to be paid for damages caused by the taking of land in the exercise of the power of eminent domain, but only that the landowner be compensated for the value of the land actually taken.

It is true that section 58 of the Constitution of Virginia prohibits the enactment of "any law whereby private property shall be taken *or damaged* for public uses without just compensation." But whether the mandates of this section are met by judicial proceedings provided by State laws to be conducted in State courts is not a Federal question, but one for the determination of the Virginia courts alone. Therefore, whether such proceedings have resulted in the payment to Appellant of proper interest on consequential damages sustained by him is not a Federal question at all. The judgment of the Virginia Supreme Court of Appeals on this question will be accepted as conclusive in this Court.

ARGUMENT

This appeal should be dismissed for want of a properly presented, substantial Federal question.

I.

General Statement of Requirements of Due Process

The statutes of Virginia, as construed by her highest Court, provide fair and adequate machinery for ascertaining the compensation and amount of damages to which a landowner is entitled by reason of the taking of his property by the State under its power of eminent domain. However, even if the Court should be of opinion that some other method of determination of values and damages is more desirable, this would not justify a finding that due process is lacking. To so find, it must appear that there has been a gross disregard of the right of the owner to be compensated for the taking of his property. The due process clause does not insure immunity from judicial error.[1]

The value of Appellant's property taken and damages to the residue have been ascertained by impartial commissioners under the supervision of the Circuit Court.

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[1] *Honeyman* v. *Hanan*, 302 U. S. 375, 378; *Seattle R. & S. R. Co.* v. *Washington*, 231 U. S. 568, 570; *Gasket* v. *Lapeyre*, 242 U. S. 367, 369; *McCoy* v. *Union Elev. Ry. Co.*, 247 U. S. 354, 363; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332; *Roberts* v. *New York*, 295 U. S. 264; *Backus* v. *Fort St. Depot*, 169 U. S. 557; *Appleby* v. *Buffalo*, 221 U. S. 524, 532; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393-4.

Appellant makes no charge of any misconduct. The amount awarded greatly exceeded what the Appellee's counsel in the Circuit Court thought fair, as appears from the exceptions filed by him (R. pp. 30-33). The Supreme Court of Appeals has pronounced the judgment plainly right.

With this background the Assignment of Error will be considered.

II.

First and Second Assignments of Error

Appellant complains of denial of due process because the statute does not insure a view of the property of a landowner by the commissioners until after the completion of the construction of the highway. He argues that the viewers cannot then visualize the original condition of the ground from blue prints or the surrounding contours. He ignores the fact, however, that they would have the same or perhaps greater difficulty in visualizing beforehand the changed condition which will result from the improvements contemplated. There is no such material difference in their ability to properly evaluate the compensation and damages in these respective situations as to operate to the prejudice of the landowner. Certainly there is no such arbitrary impairment or destruction of his rights in the prescribed procedure as can be held to be a denial of due process. Section 258-a of the United States Code goes even further than the Virginia statute in that it immediately vests title to the land to be taken

upon the deposit of the amount of the estimated compensation, although an indefinite period may elapse before the determination of the actual amount thereof, and the contemplated improvements may then have been completed. The constitutionality of said section 258-a has not been challenged in this Court, but it has been sustained by numerous decisions in the lower Federal courts. See notes to section 258-a in United States Code Annotated.

Many years ago, in 1897, this Court said, "there can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof." *A. Backus & Sons* v. *Fort Street Depot Co.*, 169 U. S. 557, 558-9.

In the case of *Bragg* v. *Weaver*, 251 U. S. 57, a Virginia statute was challenged as violative of due process. The statute was substantially the same as subsection 3 of section 1969-j of Michie's Virginia Code. It empowered the public road authorities, without notice to the landowner and without the institution of any legal proceedings, to enter upon the most convenient lands and take therefrom earth to be used in the construction and repairing of the highways. If the landowner or tenant considered himself injured by such taking, provision was made, upon his complaint, for viewers to ascertain what was a just compensation for the damage sustained, with right of appeal to the Circuit Court. In sustaining the validity of the statute this Court held that the necessity and expediency

of the taking are not judicial but legislative questions and may be determined by such agency as the State may designate, and that since the statute afforded the owner ample opportunity to appeal and thereby to obtain a full hearing in the Circuit Court on the question of damages, it thus satisfied the requirements of due process. The following quotation from the opinion is pertinent to Appellant's contention that the viewers must see the land before excavations or charges in its condition are made. After stating that the hearing on appeal was sufficient the opinion continued:

> "The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the 14th Amendment merely because it precedes the ascertainment of what compensation is just. *Sweet* v. *Rechel*, 159 U. S. 380, 402, 407, 40 L. Ed. 188, 197, 198, 16 Sup. Ct. Rep. 43; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; *Williams* v. *Parker*, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; *Crozier* v. *Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 306, 56 L. ed. 771, 776, 32 Sup. Ct. Rep. 488. * * *" (251 U. S. p. 62).

But, even if there were any merit in the above contentions of Appellant, the question whether section

1969-j of the Virginia Code, under which these proceedings were instituted, is in violation of the due process clause has been adjudicated adversely to Appellant by the Supreme Court of Appeals in the equity case above referred to. *Bailey* v. *Anderson* (182 Va. 70). This is the law of the case and *res judicata*, certainly in this proceeding. Appellant seeks to escape from this conclusion on the ground that he did not argue the same objection to the statute's validity in that tribunal that he now advances here. However, he knew the highway was being constructed and that original conditions would be changed and he could have made the same argument if he had desired. Obviously he cannot re-open the same constitutional question, i.e.—whether the statute denies due process, merely by advancing a new argument or different ground of objection. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290, 291; 34 C. J. p. 818, Sec. 1236; 30 Am. Jur. p. 932, Sec. 187.

Appellant's claim in his second assignment of error that he is entitled to be paid rental at the rate of $200.00 per month for the use of the land taken for highway purposes is predicated upon the assumption that the Virginia statute authorizing the Highway Commissioner to enter upon and take possession of the land prior to the institution of condemnation proceedings is unconstitutional. He contends that Appellee's possession under such statute is, therefore, wrongful and unlawful and that due process entitles him to be compensated *by way of rental* for such unlawful use from the time of Appellee's entry until the vesting of

title in him. Since the premise of unconstitutionality, upon which his claim is based, is clearly without merit, it is not deemed necessary to discuss the other incidental questions argued by him. He has already received compensation for such use in the form of interest which is included in the award of the commissioners.

III.

Third Assignment of Error

The Appellant contends under this assignment that due process guarantees to him a finding by the commissioners of the amount of damages to property owned by him *other than that taken*, and also a judgment by the Court for interest on said amount from the time of Appellee's entry on the property *taken*. There is no dispute as to the right generally of a landowner to have proper interest allowed. The question here involved is one of procedure. In Virginia the practice is for the commissioners to include in their award the amount of all damages sustained up to the time of the making of their award, or in some cases up to three months thereafter. In other words, the interest is regarded as one of the elements of damage, and the court evidently considered it as included in the amount fixed as damages in the report of the commissioners.

While there is no decision of Virginia's highest Court involving interest in a case where the land was taken prior to the institution of condemnation proceedings, the general procedure with respect to interest on compensa-

tion and damages in such proceedings is stated in *City of Richmond* v. *Goodwyn,* 132 Va. 442, 452-454. There the compensation and damages were fixed by the commissioners before the condemnor, the City, had elected whether it would take the property at the amount fixed. The Supreme Court of Appeals, in reversing a judgment allowing certain interest on the sum fixed by the commissioners, said: "The commissioners, in fixing such compensation, are presumed to have allowed for the inconveniences, damage and delay arising out of the proceedings, certainly to the date of the filing of their report * * *." This statement was later quoted with approval in the case of *Export Leaf Tobacco Co.* v. *City of Richmond,* 163 Va. 145, 155. This later case did not arise out of condemnation proceedings, but involved the question when interest should run on a statutory award made in judicial proceedings to compensate a landowner for damages caused by a change in the grade of a street. In approving the general rule of procedure laid down in the *Goodwyn case, supra,* the Court held that interest should run from the date of the award.

A case involving the precise question under discussion arose in West Virginia in 1938; *State* v. *Painter,* 120 W. Va. 486, 199 S. E. 372. The State constitutional provisions there considered are identical with those of Virginia and the statutory proceedings quite similar, the main difference being that in West Virginia exceptions to the findings of the commissioners are tried before a jury, which is empowered to make new and independent findings. Nearly two years elapsed after

entry was made and after the commissioners' findings before the jury trial was had. The landowner claimed he was entitled to interest on the jury's award from the time of condemnor's entry on the land. The Circuit Court, however, allowed interest only from the date of the verdict. In affirming this judgment the Supreme Court of Appeals of West Virginia recognized the condemnee's right to receive interest for said time, but held further that, unless the record shows affirmatively that the jury did not take into consideration the matter of said interest, it will be presumed that it did consider it as an element of damage and that it included same in its verdict. The opinion points out the trial court "could have directed the jury to include interest from the date of taking, or reserved that matter to itself in the entry of the judgment on the verdict. Not having entertained either course, the Court had no justification for the addition of interest to the amount of the verdict." (199 S. E. 374.)

Cases in other States have applied the rule that in condemnation proceedings, in the absence of an instruction reserving the question of interest for consideration by the Court, it will be presumed that the award includes interest from the date of possession to the date of the award, among them the following: *Minot* v. *Boston*, 201 Mass. 10, 25 L. R. A. (N. S.) 311 and note; *Blackwell* v. *Bebout*, 19 Okla. 63, 14 Ann. Cas. 1145. See also 18 Am. Jur. 917, Sec. 277.

In the *Minot Case*, *supra*, the Massachusetts court emphasized the fact that "the amount of damages to be awarded, interest and all, was by the law in the hands

of the jury" and, therefore, the trial court was without power to add interest to their verdict for a period of over six years representing the time between the taking of the land and the date of the jury's verdict fixing compensation and damages.

From the foregoing authorities it is clear that the Circuit Court below had no authority to add interest to the award of the commisisoners. Although it is the practice in Virginia for the court, *sua sponte* or upon request, to instruct the commissioners upon matters relating to the fixing of compensation and damages in condemnation proceedings. (*Talbot* v. *Norfolk,* 158 Va. 387), no instructions on the question of interest were requested by the Appellant or given to them by the Circuit Court. Even the few excerpts from the testimony appearing in the record show that the commissioners were informed that construction of the highway began October 15, 1941, and that this was the date for fixing the value of the house at the beginning of construction (R. p. 28).

It was the duty of the commissioners to include all elements of damages in their award and, so far as the record shows, there is no reason to believe or infer that they omitted interest from their consideration or ignored the time which had elapsed since the work began. Furthermore, the law prescribes no fixed or arbitrary time when damages to lands not taken are deemed to be sustained. The time of taking other lands does not necessarily control. *Danforth* v. *United States,* 308 U. S. 271.

Due Process Does Not Require Payment for Damage to Lands Not Taken.

The restraint imposed upon the States by the due process clause of the Fourteenth Amendment is the same as that imposed upon the United States by that clause of the Fifth Amendment.

Twining v. *New Jersey*, 211 U. S. 78, 101;

Heiner v. *Donnan*, 285 U. S. 312, 326.

It is well settled that this constitutional provision does not require the United States, in taking lands in the exercise of its power of eminent domain, to compensate the landowner for damages caused to his other lands. All that is required is that full compensation be made for the land actually taken. *Mitchell* v. *United States*, 267 U. S. 341. Decisions of the State courts are in accord in holding that the due process clause imposes no constitutional obligation on the States beyond that of providing proper compensation for the land or rights therein which are actually taken. 18 Am. Jur. 753. (Eminent Domain, Sec. 129). See also *Chicago* v. *Taylor*, 125 U. S. 161. The resulting hardships suffered by many landowners has led to the adoption of provisions in many of the State Constitutions providing compensation for consequential damages. Section 58 of the Virginia Constitution prohibits the General Assembly from enacting "any law whereby private property shall be taken *or damaged* for public uses without just compensation." It is by reason of this provision of the State Constitution that in condemnation proceedings the statute allows any landowner compensation for

damages resulting from highway construction, regardless of whether any of his land is taken or not. Thus the order of the Circuit Court in this case directed the commissioners "to award damages, if any, resulting to the adjacent or other property of the owner, *or to the property of any other person,* from the construction and operation of said highway."

Clearly the question whether an award for damages to other lands is "just compensation" within the meaning of the Virginia Constitution is a question for the State courts to decide. The Supreme Court of Appeals has held that Appellant has received just compensation for damages resulting to his other lands, and under the well settled rule this Court will accept such decision as binding and conclusive. *J. Bacon & Sons* v. *Martin,* 305 U. S. 380, and cases cited; *Thornton* v. *Duffy,* 254 U. S. 361, 368. Since due process does not require the payment of any compensation for damages to lands not taken, *a fortiori* it does not require the payment of any interest thereon. The Appellant's claim with respect to such interest does not raise a Federal question. *Neblett* v. *Carpenter,* 305 U. S. 297, 302.

CONCLUSION

The appeal should be dismissed for want of a properly presented Federal question.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia,
Counsel for Appellee.

FILED
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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

PETITION FOR REHEARING

BERNARD B. BAILEY,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

The appellant respectfully petitions the Court for a rehearing and for a reconsideration and withdrawal of the Court's judgment and opinion rendered on November 5th, 1945, in the above styled cause.

Grounds

The grounds upon which the appellant relies are that the Court erred in that it (1) ignored the appellant's question and contentions pertaining to the statute assailed, (2) relied upon irrelevant criteria and points not in dispute in passing upon the procedural soundness of the statute, (3)

employed incorrect statements of fact by which a path was cut to the conclusion that the Federal question pertaining to interest was not properly presented, (4) relied upon pure conjecture in determining that the award may have included interest, ignoring the record proof to the contrary and the appellant's contentions in the Reply Brief, and (5) deprived the appellant of his property without a full, fair, and candid hearing contrary to the due process clause of the Fifth Amendment of the Constitution of the United States.

ARGUMENT

1. Appellant's Questions and Contentions Concerning the Statute

The Court did not consider the appellant's objection that the statute assailed is lacking in due process in subjecting the condemnation procedure to the appellant's administrative discretion: The Court did not mention the provision in Section 1969j(4) of the Virginia Code that "such property and rights of way may, in the discretion of the Commissioner, be condemned after the construction of the highway, as well as prior thereto," or the mandatory provision in Section 1969j(2) that the Court shall direct the Commissioners "to view the land." By eliminating from the appellant's contentions the element of administrative control by the appellee of the viewing of the property by the Commissioners, and by not quoting or specifically mentioning these statutory provisions, the Court has mutilated and devitalized the question presented by the appellant. The Court has removed from view the appellant's objection to the appellee's power to remove from view the original condition of the mutilated and disfigured property.

It is no answer to say that the Court expressly referred to the statute, and that anyone can read the statute and ob-

serve the provision for administrative control of the view. The point is that the Court did not refer to the fact that the appellant objected to the administrative control of the view. Even though a provision in a statute is glaringly objectionable, the Court has no power to pass upon it unless the appellant objects to it. One who reads the Court's opinion, knowing that the Court's power to review is shaped by the appellant's objections, will draw the logical and inevitable conclusion that since the Court did not pass upon the appellee's statutory control of the view, the appellant did not object to it. The appellant is thus displayed by the Court's opinion as one who did not recognize any constitutional infirmity in the ugly, one-sided, and coercive provision by which the appellee dominates the viewing of the property and controls the vital phase of the procedure by which just compensation is determined.

Throughout the appellant's first assignment of error he referred to the appellee's statutory control of the viewing procedure. He claimed that the statute violates the 14th Amendment because it vests in the appellee the power "to control the time for instituting condemnation proceedings", and "enables the appellee to manipulate a procedural phase of the condemnation, in a manner detrimental to the owner, by holding off the appointment of Commissioners to view the property until the appellee has mutilated and disfigured it to such extent that when, in the exercise of the discretion conferred by the statute assailed, the appellee permits the commissioners to view the property they can not visualize the condition thereof as it was immediately before the seizure", and because "the unconstitutional power and control bestowed by the statute was deliberately and oppressively imposed by the appellee upon the appellant to his detriment and damage."

In the appellant's brief he contended that the statute does not afford due process (1) because it "injects into the Virginia system of viewing condemned property the absolute and unlimited power of the appellee to mutilate and disfigure the property before it is viewed," thus vesting in the appellee the "combined power to mutilate the property and to manipulate the time for the view" (p. 23), and "grants to the appellee the absolute power" to distort and destroy evidence of the value of the property in its original condition, which is the chief element in determining compensation and damages (p. 24); (2) because the purpose of the administrative control vested in the appellee by the statute is to place the appellee in a superior bargaining position in negotiating for a settlement, as shown by the legislative history of the statute (pp. 28, 29), and by the undisputed evidence of the pressure exerted against the appellant in an effort to effect a settlement for one-fourth of the amount finally awarded, which constitutes a perversion of administrative discretion (pp. 29, 30); (3) because the administrative control bestowed by the statute enabled the appellee to withhold and destroy evidence that was material and important in the determination of the amount to which the appellant was entitled which could not be adequately overcome by testimony at the hearing, before the Commissioners and the Court, because of the deference accorded by the trial and appellate Courts to the determination of the commissioners based upon the impressions received through their view of the premises (pp. 30, 31, 32); and (4) that the administrative control bestowed by the statute does not safeguard the fundamental right to a fair view in the Virginia condemnation system in which a viewing of the property is mandatory (pp. 32, 33, 34).

The Court gave scant treatment to these contentions, simply saying that the appellant contended that Section

1969j(4) "infringes the asserted constitutional immunity by sanctioning appellee's entry upon the land and the alteration of its physical condition in advance of the appointment of the Commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation." This revised statement of the appellant's contentions does not mention the administrative control bestowed by the statute, or the power of the appellee, also derived from the statute, to force the appellant into a disadvantageous bargaining position and to withhold and destroy material evidence in disregard of the appellant's right to a fair view in the mandatory viewing system. The Court stated also that the appellant "was given full opportunity to be heard and to introduce evidence before the Commissioners," and that the Commissioners "could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute."

By failing to mention the appellee's absolute control of the view, the Court implies that the appellant made no objection to the fact that the appellee withheld the view until it suited him to have the property inspected by those who determined what the appellant should receive. The Court implies that the appellant made no objection to the fact that the appellee forced the appellant to take a defensive position, and forced the appellant to counteract by testimony the unfavorable impressions which the appellee through his statutory power caused the Commissioners to receive when they viewed the property. It appears from the Court's opinion, that the appellant simply objected to the appellee's statutory power to enter and construct the highway before the property is viewed.

Of course the statute would be unobjectionable if it did not allow the appellee to control the view. The statute

would be intolerable if it *expressly* provided that the appellee shall have the exclusive power to determine whether the property in its original condition shall be viewed by the Commissioners. In its present form the statute gives that power to the appellee, but the power is disguised in the garb of the power to determine whether the property shall be condemned before or after the construction of the highway. To say that the Court would not be justified in ignoring an objection to an *express* provision for administrative control of the view, but is justified in ignoring an objection to an *implied* provision for administrative control of the view—"to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them." *Snyder* v. *Mass.*, 291 U. S. 97, 122.

By ignoring the restraining and bargaining features of the statute, the appellee's dominant position, the appellant's subordinate position, and the appellant's disadvantage in the ascertainment of just compensation, the Court has cut out the very heart of the appellant's contentions, leaving only the lifeless form of contentions that have "long been settled."

2. Irrelevant Criteria

The Court relied upon points not in dispute, disregarding the express statements in the appellant's brief with reference to the mutilation of the property before condemnation, and with reference to the viewing of the property by those who ascertain compensation.

The appellant expressly conceded that without violating the Fourteenth Amendment property may be taken and mutilated before payment of compensation or before instituting condemnation proceedings "where the statute does not establish a procedure for ascertaining compensation and damages that allows the highway authorities to con-

trol the time in which to institute condemnation proceedings." (Appellant's brief, p. 22.) In its opinion the Court stated: "But it has long been settled that due process does not require the condemnation of land to be in advance of the occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken." Obviously the Court disregarded the appellant's contention that administrative control of the time in which to institute condemnation proceedings, which necessarily involves absolute control of the mandatory viewing procedure, is constitutionally objectionable.

From the Court's opinion it appears that the appellant objected simply to the occupation of the land before it was condemned, which is directly contrary to the express statement in the appellant's brief. The appellee's administrative control of the time for instituting proceedings, and his power to cause a view to be made after the mutilation of the property, was obscured by the Court's reference to the opportunity of the appellant to be heard and to offer evidence as to the value of the land taken. The appellant did not contend that he had no opportunity to be heard or to offer evidence as to the value of the land taken. His objection was that the appellee's statutory control of the view is not counterbalanced by the appellant's right to be heard and to offer evidence as to value. The Court ignored the appellant's reference to *Snyder* v. *Mass.*, 291 U. S. 97, and the appellant's contention that the withholding of the view, "the inevitable effect" of which is "that of evidence" (p. 33 of brief) constitutes a deprivation of a right "ranked as fundamental" (p. 32 of brief) even though the owner is allowed a hearing and an opportunity to offer evidence.

It has not "long been settled", and by its opinion in this case the Court has not settled that due process does not

require that the procedure for the determination of just compensation shall be free from the dominating and coercive control of state officials exercising the power of eminent domain "provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken."

The appellant expressly conceded in his brief that without infringing the Fourteenth Amendment "a state may require that the property be viewed by commissioners appointed to determine the compensation and damages" (p. 23). It was not necessary, therefore, for the Court to observe that the value "may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review in which a trial upon evidence may be had." Whether a hearing is required after an entry and after the view is an entirely irrelevant question brought into the case by the Court, not by the appellant. The fact that a hearing is not required after entry and view, if the award is subject to a proper review, has no bearing whatever upon the real question which the appellant plainly presented for the Court's decision, namely, whether a view is in accord with due process when it is subject to the exclusive control of a state official who forces the owner to accept a view, after the property has been mutilated and disfigured at the pleasure of the official, as the basis for determining the value of the property before it was mutilated and disfigured. The appellant's question has been blotted out by the interpolation of an extraneous question.

The appellant's question is again avoided by the Court in the statement that the commissioners "could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute." The question is not whether they *could* do so, or whether it was their *duty* to do so. The question is whether due process requires that they shall not

be *forced* to do so by a state official exercising the power of eminent domain. Without the element of sovereign control and domination, obviously the owner can not complain if he is "given full opportunity to be heard and to introduce evidence before the Commissioners" after they have viewed the mutilated property, because the owner would have full opportunity to act promptly on his own motion to have the property viewed before the evidence of its original value is obscured from view. But with the sovereign control and domination the owner has no such choice, and he is forced to accept a disadvantageous view and to rely upon the *duty* of the commissioners to consider impressions through their ears to overcome impressions received through their eyes, the "inevitable effect" of which is "that of evidence". *Snyder* v. *Mass.*, 291 U. S. 97, 121. The *duty* of the commissioners under the statute is a veil too thin to conceal the *duty* of a state official under a free government to keep his manipulating hands off the fundamental procedure by which private property is wrested from an individual against his will. The power of a state official to select the type of evidence that the viewers shall see with their eyes is no different from the power of a state official to select the type of testimony that the viewers shall hear from the lips of witnesses after the view. No Court would hold that the appellee may determine what evidence shall be received in the court room. Likewise, no Court, if it squarely and fairly considered the question, would hold that the appellee may determine what evidence the viewers shall consider outside the court room.

Further disregard of the question of administrative control of the view is shown by the Court's statement that the award is made subject to judicial review and may be set aside "if plainly wrong or without support in the evidence." That the award may be set aside for these reasons does not touch the appellant's question whether the appellee may

distort the evidence upon which the award is based, the very evidence that carries the greatest weight when the award is judicially reviewed. From *Barnes* v. *Tidewater Ry. Co.*, and *Duncan* v. *State Highway Com'r.*, cited by the Court and by the appellant, and from the other cases cited by the appellant (p. 24 of brief), the Court failed to extract the principle which has long been settled in Virginia and by this Court that the evidence received through a view of the property outweighs the evidence adduced at the hearing, constitutes the controlling factor in the determination by the viewers of the amount to be awarded, and is the very basis for the rule that the award will not be disturbed in the absence of some irregularity in the proceeding. In *Cranford Paving Co.* v. *Baum*, 97 Va. 501, 503, 504, the Court said: "The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners. They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself which is taken, and judging as to its value * * *. We are without the benefit of their opportunities, and of what they saw and were the judges." In *R. & P. Electric Co.* v. *Seaboard A. L. Ry.*, 103 Va. 399, the Court referred to the decision of this Court in *Shoemaker* v. *U. S.*, 147 U. S. 282, 306, in which the Court approved the statement in Mills on Eminent Domain that the commissioners "hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence." To the same effect is *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 560. In *Hunters' Adm.* v. *C. & O. R. Co.*, 107 Va. 158, 171, 172, the Court again relied upon the *Shoemaker* case and Mills on Eminent Domain, and the Court said that the commissioners are "greatly aided in the majority of cases by the evidence of their own senses, they having

the advantage of seeing the property itself which is taken, and judging as to its value." In *Barnes* v. *Tidewater Ry. Co.*, 107 Va. 263, 267, the Court again relied upon the *Shoemaker* case and Mills on Eminent Domain, the Court saying that the commissioners make their principal evidence "out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence." In *Duncan* v. *State Highway Comr.*, 142 Va. 135, 147, 148, emphasis was placed upon the fact that the commissioners "go upon the land, examine it", and have the advantage of "inspecting the property", as well as hearing the witnesses. In *Monticello Min. Springs* v. *City of Richmond*, 147 Va. 355, 367, the Court again relied upon the *Shoemaker* case and Mills on Eminent Domain, and said that the commissioners "may base their finding largely upon facts obtained by a view of the property, which do not appear in the record." In *Shirley* v. *Russell*, 149 Va. 658, 664, the Court said: "The law lays great stress upon the view. The commissioners are greatly aided, as they were in this case, by the evidence of their own senses, and the law justly attaches great weight to their report." In *Yeary* v. *Holbrook*, 171 Va. 266, 276, the Court quoted with approval from Wigmore on Evidence, that an "autoptic inspection" of the premises "is an even more direct and satisfactory source of proof" than testimonial evidence.

Thus the Court, in saying that the "award is made subject to judicial review by Section 1969j(2), and upon such review may be set aside if plainly wrong or without support in the evidence", completely ignored the question presented by the appellant whether due process requires that the viewing of the property shall not be subjected to the dominating and coercive control of a state official where the evidence received through the view outweighs the evidence adduced at the hearing and is the very basis upon which the Court refuses to disturb the award upon a judicial review. The ques-

tion presented is not whether the statute provides for a judicial review, but whether the statute is constitutional in allowing the appellee to tamper with and completely control the evidence upon which the Court relies in refusing to disturb the award when it is judicially reviewed. The Court has not faced the real question at all.

3. Incorrect Statement of Facts Concerning Interest

In constructing the argument by which the Court concluded that the appellant did not properly present the federal question concerning interest, the Court made incorrect statements, for which there is no support in the record, as follows:

> "Appellant also insists that the state court judgment failed to include in the award interest from the date of the occupation of his land by appellee; that the award thus denied to him just compensation. * * * Appellant's petition in the circuit court asked that the award include interest from the date of taking. The circuit court, without explanation overruled his exceptions to the failure of the Commissioners' report to award the interest demanded."

If the appellant excepted to the commissioners' report because it did not award interest, clearly the appellant should have apprised the circuit court of the ground of his exception. If the appellant did not except to the commissioners' report because it did not award interest, it is equally clear that when the appellant asked the circuit court to allow interest on the amount awarded by the commissioners it was not necessary to set up as the ground for the request the contention that if the court refused the request the appellant would be deprived of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. It is also true that if the Court's statements are incorrect, they constitute an

unjust reflection upon the appellant's knowledge of proper procedure and upon his ability to present a federal question at the proper time in order to bring it to this Court for review.

The appellant did not file a petition in the circuit court, but he filed a plea as his grounds of defense (R. 4). In the plea he did not ask "that the award include interest." The plea speaks for itself. In paragraph 3 of the plea the appellant claimed "interest at the lawful rate on the total amount awarded as compensation and damages * * *." This language does not justify the Court's statement that the appellant asked that the *award include* interest. The only possible ground for saying that the appellant asked that the *award include* interest would be that it is not the province of the court to add interest to the award, which is not a valid ground because the court obviously has that power. See 20 C. J. Section 252, p. 811; 29 C. J. S., Section 176, p. 1056. The appellant asked for interest *on* the award, not that interest be *included in* the award.

In his third assignment of errors, the appellant expressly insisted that the Virginia Court erred in denying interest "on the amount awarded." Obviously this Court was incorrect in stating that the appellant insisted before this Court that the state court judgment failed to "include in the award" interest, etc. * * * and that the "award thus denied" to him just compensation, etc. By interpolating the words "include", "in", the words "award thus denied", and the words "failure of the Commissioners' report to award the interest demanded", words not shown in the record or in the appellant's petition for appeal or in his brief, the Court committed gross error which changed completely the appellant's claim and contention and laid the foundation for the conclusion by which the Court avoided the consideration of the constitutional question. Even though the Court should find some other ground for

avoiding the constitutional question, it is under a plain duty to correct its statements since they are highly detrimental to the appellant.

That the appellant did not ask in the circuit court that the *award include* interest, but asked that the Court add interest to the award, is shown by the record fact that after the award was made the appellant, after waiving his claim for interest on the amount awarded for the land taken, moved the circuit court to allow his plea to be amended to show the waiver and to show that he claimed interest on the amount awarded as damages to the residue (R. 35). If the appellant had asked in his plea that the *award include* interest, he would not have asked the court, after the award was made, for permission to amend the plea. The circuit court expressed the opinion that the appellant was not entitled to interest "on the amount awarded", and stated that the appellant's claim for interest "on the $6,500.00" was denied (R. 35). There is nothing in the record to justify the implication that the appellant first submitted to the commissioners his claim for interest, and then after they had failed expressly to grant it the appellant tried to reopen his claim by applying to the court to allow interest on the amount awarded as damages.

That the appellant did not ask in the circuit court that the *award include* interest is shown further by the fact that the appellant did not ask the court to instruct the commissioners to include interest in their award. By stating that the appellant asked in his plea that the *award include* interest the Court implies that the appellant and the circuit court failed to exercise the skill and care necessary to inform the commissioners with respect to their duty to award interest.

Since the appellant did not ask in the circuit court that the *award include* interest, there is no foundation for the

Court's statement that the appellant made *exceptions to the failure of the Commissioners' report to award the interest demanded.* Furthermore, the appellant's exceptions to the report show conclusively that interest was not mentioned or contemplated. The appellant excepted to the commissioners' report on the ground "that the amounts awarded as compensation for the land taken for the highway and for damages to the residue resulting from the highway construction are grossly disproportionate to the claims made by the defendant, which claims were based upon a view of the property before as well as after the property was mutilated and disfigured by the highway construction" (R. 29, 30). Obviously there were no *exceptions to the failure of the Commissioners' report to award the interest demanded* because the exceptions were expressly confined to claims which were *based upon a view of the property,* and the claim of interest was not based upon a view of the property. The error of the Court, in stating that the appellant excepted to the commissioners' report because it failed to award the interest demanded, was gross and obvious.

During the oral argument, Mr. Justice Black asked the appellant whether he excepted to the commissioners' award on the ground that it did not include interest, and the appellant replied that he did not because the question of interest was not submitted to the commissioners. By stating that the appellant excepted *to the failure of the Commissioners' report to award interest,* the Court contradicts without any proof the statement made by the appellant in open court.

Since the appellant did not ask that the award include interest, since he did not except to the commissioners' report on the ground that it failed to award interest, since he applied to the circuit court for interest on the amount awarded as damages, and since he had no reason to believe that the court would deny interest, it was not incumbent

upon him to raise the federal question with respect to his claim for interest until after the circuit court denied the appellant's claim for interest. *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 495; *Herndon* v. *Georgia*, 295 U. S. 441, 444. It was not the appellant's duty to state to the circuit court that he was claiming interest from the court, and that he wished to advise the court that if the court denied his claim for interest the denial would deprive him of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. When the appellant made his claim for compensation for the use of the property taken for the highway he set up the objection that to deny such compensation would deprive him of his property without due process of law contrary to the Fourteenth Amendment (R. 8), but the reason for that was that the appellant had been warned by the decision in *Bailey* v. *Anderson*, 182 Va. 70, that while the Court had not passed upon the statute assailed it showed that it was very reluctant to interfere with the statute and probably would be reluctant to allow compensation for the use of the property based upon the invalidity of the statute. But because the appellant may have been too cautious concerning his claim for compensation for use is no reason for saying that he should have exercised the same caution with respect to his claim for interest, because he had no cause whatever to believe that the circuit court or the Supreme Court of Appeals would deny interest.

Since it was not necessary to raise the federal question with respect to interest until after the circuit court had denied the claim for interest, Rule 22 of the Virginia Court has no application. That rule applies to objections, not to claims. Neither that rule nor the decisions of the Virginia Court required the appellant to make a second request to the circuit court to allow interest on the damages awarded accompanied by an objection that the circuit

court's denial of the first request to allow interest violated the Fourteenth Amendment. The appellant's first opportunity to raise the federal question after the circuit court denied his claim for interest was in his petition for writ of error to the Supreme Court of Appeals to review the ruling of the circuit court denying the claim for interest. Since the federal question was timely presented, the failure of the Supreme Court of Appeals specifically to pass upon the federal question is immaterial, and this Court has jurisdiction. *Lawrence* v. *State Tax Com. of Miss.*, 286 U. S. 276, 282.

The Court states that the appellant's assignments in the Supreme Court of Appeals relating to interest "failed to draw in question the constitutional validity of any statute as is required by Section 237 (a) of the Judicial Code." The theory upon which the appellant claims that this Court has jurisdiction upon appeal to review the question of interest is not that the claim for interest derives from a statute, but that the claim is included in a case in which Section 1969j(4) was assailed as in violation of the Fourteenth Amendment and the statute was upheld by the state courts. *Flourney* v. *Weiner*, 321 U. S. 253, 754; see also *Prudential Ins. Co. of America* v. *Cheek*, 259 U. S. 530, 547; appellant's Jurisdictional Statement, p. 14. Aside from that, the Court is not justified in refusing to consider the federal question relating to interest under Section 237 (c) of the Judicial Code, by way of certiorari.

4. Conjectural Conclusion as to Inclusion of Interest in Award

The Court has accepted without analysis the superficial argument of the Attorney General that the award included interest. It has relied upon two Virginia decisions which are not in point at all for the reasons set forth in appellant's

reply brief (pp. 11-21). After the appellant had taken great pains to distinguish these and other cases cited by the Attorney General, and after the appellant had employed most of his time on the oral argument in an effort to draw the attention of the Court to the undisputed facts in the record which point unmistakably to the fact that the commissioners did not include, and did not consider, interest in their report of the award, the Court in its opinion makes the startling statement that "Nothing appears to the contrary", and accepts without question or discussion the general and loose argument of the appellee. The appellant's reply brief was filed after the oral argument, but he obtained the permission of the Court to file it because the appellee failed to file his brief in time. There is no indication that the Court considered the analysis and argument presented in the appellant's reply brief. The Court can not state that nothing is shown to dispute the appellee's argument without having failed to consider the appellant's reply brief, and if the appellant's reply brief has not been considered he has not been afforded a full and fair hearing on the question presented.

That the commissioners did not consider the question of compensation, by way of interest or damages, for delay in payment or for the use of the land is shown by the affidavits of four of the commissioners, which are filed herewith and made a part hereof, as follows:

> "* * * In making up our award of compensation and damages, we did not consider or pass upon the question whether the defendant was entitled to interest, damages, or compensation for delay in payment of the amount awarded, or for the use of his land for highway purposes before payment of the amount awarded. Interest was not included in the award."

These affidavits are submitted to the Court for the purpose of supporting and explaining the record, not to im-

peach it. 64 C. J., Section 914, pp. 1108 et seq. That an affidavit is admissible to show that the jury did not consider interest is shown by *Swails* v. *Cissna*, 61 Iowa 693; see also *Davis* v. *Huber Mfg. Co.*, 119 Iowa 67; *Strand* v. *Grinnell Auto. Garage Co.*, 136 Iowa 68; *Miller* v. *Blue Ridge Transp. Co.*, 123 W. Va. 428.

While evidence dehors the record will not be received to supplement the record (*Henneford* v. *N. Pac. Ry. Co.*, 303 U. S. 17, 19; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589), it will be received to show that the question in the case is moot (*Dakota County* v. *Glidden*, 113 U. S. 222, 226; see also *Elwell* v. *Fosdick*, 134 U. S. 500, 513; *Kimball* v. *Kimball*, 174 U. S. 158, 162; *Gulf, Col. & S. F. Ry.* v. *Dennis*, 224 U. S. 503, 508; *Kendall* v. *Ewert*, 259 U. S. 139, 147, 148), and there is no reason for rejecting it when offered to show that the question is not moot, particularly where, as in this case, there is no evidence in the record that the question is moot, and the conclusion that the commissioners may have included interest in their award is made "without reference to any evidence, upon proofs drawn from the clouds." *Ohio Bell Tel. Co.* v. *Pub. U. Com.*, 301 U. S. 292, 307.

It was not the appellant's duty to produce these affidavits in the Virginia courts to cure some defect in the record. The affidavits bear upon a question of doubt raised for the first time in this Court, a doubt which the Court was not justified in raising from the record. To reject the affidavits because they are not technically in the record, and to rely upon a vague doubt that has ceased to have any probative force, would be to smother known truth with a technicality, and would "deliver up the court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal, the means of inflicting gross injustice." *Dakota County* v. *Glidden*, 113 U. S. 222, 226.

If the Court rejects the affidavits as proof that interest was not included in the award, there is no reason for not

remanding the case so that the evidence of the truth can be brought into the record to satisfy the technical requirement of the Court. Obviously the Court is not powerless to direct the course of this case so that truth and justice may be established. The affidavits are sufficient to cause the Court to recede from its technical position, and to dispose of the question realistically.

5. Denial of a Full and Fair Hearing

It is not the province of the Court to revise or reshape the questions and contentions presented, particularly where the result is to dismiss the question and contentions because they are unsubstantial. A hearing is not judicial in any sense unless the precise question and contentions presented are made known by the Court and considered by it. *Cf. West Ohio Gas Co.* v. *P. U. Com.*, 294 U. S. 63, 69. Judicial procedure is "perverted from its proper function" when it becomes irresponsive to the pleadings and contentions of the parties. *Cf. Reed* v. *Allen*, 286 U. S. 191, 209, dissent of Mr. Justice Cardozo. It is not fair to the appellant to require him precisely and carefully to state and have printed the question presented, and the contentions pertaining to the substantial character of the question (Rules 9, 12, and 27 of this Court), and then for the Court without considering the precise question or the contentions to dismiss the petition for the lack of a substantial federal question. In spite of the natural reluctance of the Court to pass upon constitutional questions involving legislative policy, the avoidance of the difficulty should not be "pressed to the point of disingenuous evasion." *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379; *Hopkins Fed. S. & L. Assoc.* v. *Cleary*, 296 U. S. 315, 335. The doctrine of sovereign immunity allows the sovereign to consider or ignore questions adversely affecting its interests, but the doctrine does not authorize the Court to sift the issues and select the

questions to be considered in a controversy in which the agent of the sovereign is a party.

The appellant contends that he has not been accorded by this Court a "full and candid" hearing (*Roberts* v. *New York*, 295 U. S. 264, 278), and unless the Court grants a rehearing he will be deprived of his property without due process of law contrary to the Fifth Amendment of the Constitution of the United States, in that the Court has not considered the appellant's precise question and contentions concerning the statute assailed, has relied upon irrelevant issues which have obscured the appellant's contentions, and upon incorrect statements which have completely changed the basis upon which the federal question as to interest was presented, and has accepted a superficial theory of inclusion of interest in the award of compensation without giving any effect to the record facts or to the contentions made by the appellant in his reply brief.

Conclusion

WHEREFORE, the appellant prays that the judgment of the Court dismissing his petition for appeal for want of any properly presented substantial federal question be set aside, that a rehearing be granted, and that the Court grant the relief prayed for in the petition for appeal, and for such other relief as the Court may determine to be just and proper.

Respectfully submitted,

BERNARD B. BAILEY,
Pro se.

Certificate

I, Bernard B. Bailey, do hereby certify that the foregoing petition is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

BERNARD B. BAILEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1945.

Bernard B. Bailey, Appellant, *vs.* J. A. Anderson, State Highway Commissioner of Virginia.	Appeal from the Supreme Court of Appeals of the State of Virginia.

[November 5, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellee, State Highway Commissioner of Virginia, brought this poceeding in conformity to §§ 1969j(1)-1969j(6) of the Virginia Code of 1942, to condemn appellant's land for use as a public highway. Acting under § 1969j(4), appellee entered on the land and constructed the highway in advance of its condemnation. In the condemnation proceeding, begun in the circuit court within sixty days after the completion of the highway, the Commissioners, appointed and acting pursuant to § 1969j(2), after viewing the land, and hearing evidence, made an award of $1,500 for the land occupied by the highway, and of $6,500 for damages "resulting to the adjacent or other property of the owner."

The Virginia Circuit Court confirmed the Commissioners' report, and by its decree directed that interest be paid on the amount of the award from the date of the decree. The Supreme Court of Appeals of Virginia, without opinion, denied appellant's petition for a writ of error. The case comes here on appeal, § 237(a) Judicial Code, 28 U. S. C. § 344(a), appellant assigning as error that §§ 1969j(4) and 1969j(6), as applied to appellant, deny to him the due process guaranteed by the Fourteenth Amendment. On examination of appellant's jurisdictional statement we postponed the question of our jurisdiction to the argument on the merits.

Appellant contends here, as he did in the state courts, that § 1969j(4) infringes the asserted constitutional immunity by sanctioning appellee's entry upon the land and the alteration of its physical condition, in advance of the appointment of the Commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation. But it has long been settled that due process does not require the condemnation of land

to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. *Bragg* v. *Weaver*, 251 U. S. 57, 62, and cases cited; *Joslin Co.* v. *Providence*, 262 U. S. 668, 677; *Georgia* v. *Chattanooga*, 264 U. S. 472, 483. Its value may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review, in which a trial upon evidence may be had. *Pearson* v. *Yewdall*, 95 U. S. 294, 296; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569; *Bragg* v. *Weaver*, *supra*, 59, and cases cited; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 284-285.

Here appellant was given full opportunity to be heard and to introduce evidence before the Commissioners. They could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute. Their award is made subject to judicial review by § 1969j(2), and upon such review may be set aside if plainly wrong or without support in the evidence. *Barnes* v. *Tidewater Railway Co.*; 107 Va. 263, 266-268; *Duncan* v. *State Highway Commission*, 142 Va. 135, 146-148. In this we find no denial of due process, and appellant's contention presents no substantial constitutional question, as the authorities cited show.

Appellant also insists that the state court judgment failed to include in the award interest from the date of the occupation of his land by appellee; that the award thus denied to him just compensation for the land taken, in violation of the due process clause of the Fourteenth Amendment. See *Del., L. & W. R. R.* v. *Morristown*, 276 U. S. 182. Appellant's petition in the circuit court asked that the award include interest from the date of taking. The circuit court, without explanation, ~~overruled his exceptions to the failure of the Commissioners to award the interest demanded~~. But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest. Further, nothing appears in the record to indicate that the Commissioners' award of damages did not include the interest claimed. Appellee argues that the applicable statutes contemplate that the award shall include interest as compensation "for the damage and de-

rejected his claim for interest.

lay" from the time of the occupation of the premises to the date of the Commissioners' report and for such further time within which application may be made for judicial review, see *City of Richmond* v. *Goodwyn*, 132 Va. 442, 452-454; *Export Leaf Tobacco Co.* v. *Richmond*, 163 Va. 145, 155-156. Nothing appears to the contrary.

Appellant, for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the state Supreme Court of Appeals. The assignments relating to interest failed to draw in question the constitutional validity of any statute as is required by § 237 (a) of the Judicial Code. The state Supreme Court by its order refusing the writ of error declared that upon consideration of the record it was of opinion that the judgment below was "plainly right."

Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va. lxxv; cf. *Ward Co.* v. *Henderson White Co.*, 107 Va. 626, 628-629; *Bliss* v. *Spencer*, 125 Va. 36, 50; *Reynolds* v. *Adams*, 125 Va. 295, 314. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virginia, by denying writ of error passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. *Jacobi* v. *Alabama*, 187 U. S. 133, 135-136; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 309; *Chicago, Ind. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 131; see *Flournoy* v. *Wiener*, 321 U. S. 253, 262-263, and cases cited.

The appeal must be dismissed for want of any properly presented substantial federal question.

Dismissed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.